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Counsel for appellee to argue on their Brief & Record

Woods

Jan. 27. 1882

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 227.

G. A. SCOVILL AND THOMAS H. ANNABLE, ASSIGNEES IN BANKRUPTCY OF THE FORT SCOTT COAL AND MINING COMPANY, PLAINTIFFS IN ERROR,

vs.

NATHANIEL THAYER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

**FILED AUGUST 11, 1879.**

~~26 Gr.~~

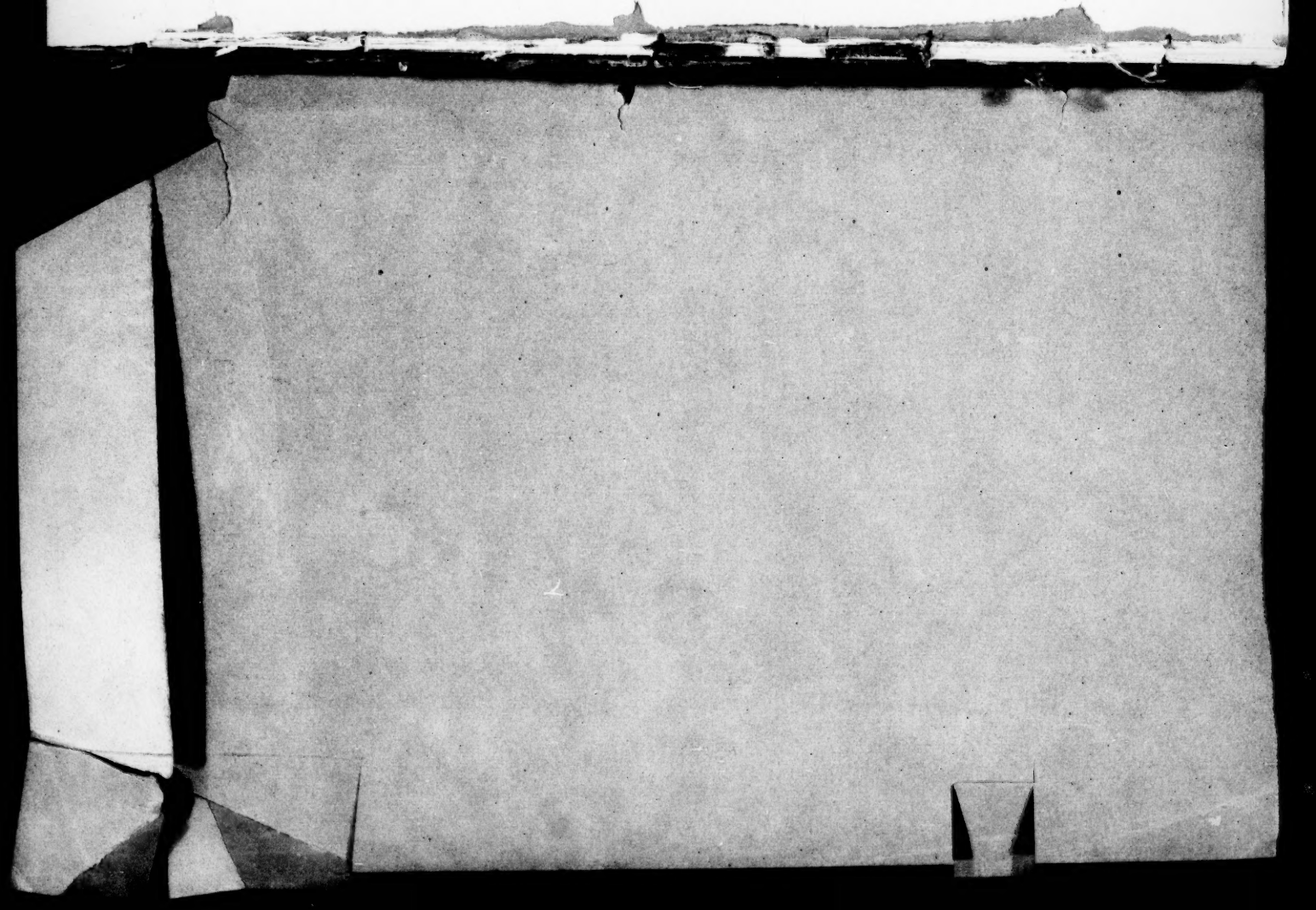
~~4 How. 576~~

~~8 How. 19~~

~~24 How. 174~~

~~16 Wall. 454~~

8 Wall. 168



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1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court, before you, between George A. Scovill and Thomas H. Annable, both of Fort Scott, in the district of Kansas, as they are assignees in bankruptcy of the Fort Scott Coal and Mining Company, a corporation duly organized under the laws of the State of Kansas, plaintiff, and Nathaniel Thayer, of Boston, in the district of Massachusetts, defendant, in an action of contract, a manifest error hath happened to the great damage of the plaintiffs, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the sixteenth day of July, in the year of our Lord one thousand eight hundred and seventy-nine.

JOHN G. STETSON,
*Clerk of the Circuit Court of the United States,*
*District of Massachusetts.*

Allowed by—

JOHN LOWELL,
*U. S. Circuit Judge.*

2 Circuit court of the United States, district of Massachusetts, ss.

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this sixth day of August, A. D. 1879.

[SEAL.] JOHN G. STETSON, *Clerk.*

3 The United States of America to Nathaniel Thayer, of Boston, in the district of Massachusetts, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States within and for the dis-

trict of Massachusetts, wherein George A. Scovill and Thomas H. Annable, both of Fort Scott, in the district of Kansas, as they are assignees in bankruptcy of the Fort Scott Coal and Mining Company, a corporation duly organized under the laws of the State of Kansas, plaintiffs in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John Lowell, U. S. circuit judge first judicial circuit, this sixteenth day of July, in the year of our Lord one thousand eight hundred and seventy-nine.

JOHN LOWELL,
*U. S. Circuit Judge.*

Due, sufficient, and legal service of the foregoing citation is hereby acknowledged.

RUSSELL & PUTNAM,
*For Def't in Error.*

4 UNITED STATES OF AMERICA,
*Massachusetts District, ss:*

At a circuit court of the United States begun and holden at Boston, within and for the district of Massachusetts, on Wednesday the fifteenth day of May, in the year of our Lord one thousand eight hundred and seventy-eight, before the honorable Nathan Clifford, associate justice.

| | |
|---|---|
| GUSTAVUS A. SCOVILL AND THOMAS H. ANNABLE, both of Fort Scott, in the district of Kansas, as they are the assignees in bankruptcy of the Fort Scott Coal and Mining Company, a corporation duly organized under the laws of the State of Kansas, a bankrupt, plaintiffs. | In an action of contract. |
| *v.* | |
| 4a NATHANIEL THAYER, OF BOSTON, IN said district of Massachusetts, defendant. | |

The writ in this cause is dated the ninth day of April, A. D. 1877, and was entered here at the May term of this court, A. D. 1877, when and where the parties appeared by their respective attorneys. On the fifteenth day of May, A. D. 1877, upon the entry of said writ, the following declaration was filed, namely:

*Declaration.*

5 DISTRICT OF MASSACHUSETTS, *ss:*

Gustavus A. Scovill and Thomas H. Annable, who are assignees of the Fort Scott Coal and Mining Company of Kansas, a corporation heretofore created, and existing under the laws of the State of Kansas, and having its principal office and place of business at the city of Fort Scott, in the State of Kansas, which said corporation has been heretofore, by the order and judgment of the district court of the United States for the district of Kansas, sitting as a court of bankruptcy, adjudged a bankrupt in accordance with the act of Congress approved

March 2, 1867, and the amendments thereto, by M'Connas and M'Keighan, and C. W. Blair, their attorneys, complain of Nathaniel Thayer, defendant in this action, and who has been duly summoned, etc., in an action of contract, for that whereas the said Fort Scott Coal and Mining Company, being a corporation created, to wit, on the tenth
5a day of June, A. D. 1870, and existing under and in pursuance of the general corporation laws of Kansas, and by virtue of an act of the legislature of the State of Kansas entitled "An act concerning private corporations," approved March 6, 1862, and amendments thereto, for the purpose of mining and digging coal and other minerals, and of buying and selling the same, in the county of Bourbon, State of Kansas, and such other counties in said State and elsewhere as might be deemed necessary, and deriving profits to its stockholders from its said business, and having at and before said adjudication in bankruptcy, and holding itself out as having and doing business, as having a capital stock of four hundred thousand dollars, all of which was at and before said date of adjudication subscribed for, and was taken and held by its several stockholders, which said capital stock was divided into shares of one hundred dollars each; and whereas heretofore, to wit, on November 4, 1872, the said defendant at to wit, the said city of Fort Scott, Kansas, became the legal owner and holder at his special instance and request of two hundred & eighty-five shares of one hundred dollars each of the capital stock of said Fort Scott Coal and Mining Company, upon which defendant paid a small sum, to wit, nine thousand & four hundred dollars, the residue and balance thereof being subject to call and assessment of the said company, its board of directors, agents or creditors or assignees in bankruptcy, whenever thereafter the same should be required to pay the debts and liabilities of said corporation.

And whereas, to wit, on the 4th day of November, A. D. 1872, the said Fort Scott Coal and Mining Company, at, to wit, the said city of Fort Scott, did make, execute, and deliver to the said defendant a certificate of, to wit, two hundred & eighty shares of its capital stock, which the said defendant had, as aforesaid, become the owner of, which said certificate was taken and accepted by the said defendant, whereby the said defendant became and was a stockholder in said corporation to the extent of the shares aforesaid apportioned and set over to the said defendant, whereby the said defendant became, and has ever since continued to be, a stockholder in said company.

5b And whereas the said defendant at the said date of adjudication in bankruptcy was still the owner of said shares.

And whereas afterwards the said Fort Scott Coal and Mining Company became unable to meet its liabilities, and upon a petition filed in bankruptcy, in said district court of the United States for the district of Kansas, on, to wit, the second day of April, A. D. 1874, by Goodlander, Currier & Co., creditors of said company, against the said Fort Scott Coal and Mining Company, the said company was afterwards on, to wit, the eleventh day of April, A. D. 1874, duly adjudged a bankrupt by the said district court, in pursuance of the acts of Congress of the United States in such cases made and provided, as more fully appears by the records thereof.

And whereas afterwards on, to wit, the twenty-ninth day of April, A. D. 1874, the said Gustavus A. Scovill and Thomas H. Annable were at a meeting of the creditors of said company duly held at, to wit, the said city of Fort Scott, duly elected assignees of the estate of said company, in conformity with law, and on, to wit, the fourth day of May, A. D. 1874, a deed of assignment of all the estate, effects, and property of

the said Fort Scott Coal and Mining Company was executed in due form of law at, to wit, said district of Kansas, which said deed was delivered to the said assignees so elected and appointed assignees as aforesaid, thereby vesting in them the estate, effects, and property of said bankrupt.

And whereas the United States district court for the district of Kansas, on the application and petition of the said assignees of the estate of said bankrupt, of which application the several stockholders had notice, to wit, on the tenth day of June, A. D. 1876, made and entered of record in said court a call and assessment upon the capital
6 stock of said company and the stockholders thereof, for the purpose of raising money to pay the debts of said company, a necessity having arisen for such an assessment, and said court so adjudging, of seventy-six per cent. on each share of capital stock of said company, or seventy-six dollars on each share, less a credit of whatever had been before that time paid on said stock by each of the stockholders or the assignor of any stockholder, and directed the same to be paid as hereinafter set forth on, to wit, on or before the first day of August, A. D. 1876, at, to wit, the office of the Hon. Frederick A. Scoville, in the city of Fort Scott; which said call, assessment, and order was of the following tenor and effect:

In the district court of the United States, district of Kansas.

FRIDAY, *June* 10, A. D. 1876.

Present, the Hon. C. G. Foster, judge.

In the matter of the Fort Scott Coal and Mining Company, a bankrupt, on petition of its assignees, G. A. Scovill and T. H. Annable, *its assignees*, for an order and decree to assess the stockholders.

The said assignees having heretofore, viz, thirty-first day of March, A. D. 1876, filed their petition in said court, setting forth the condition of its assets, liabilities, and resources, with a statement of amount of unpaid stock, names and residence of stockholders, and a rule having been made by said court, on said filing of said petition, requiring the said stockholders to show cause why an assessment should not be made according to the prayer of said petition, which said rule was made returnable on the twenty-first day of April, A. D. 1876, and extended to this day, viz, the tenth day of June, 1876, by consent of stockholders and said assignees and the order of this court, the said cause came on for hearing, etc., on the exceptions and objections of stockholder, R. S. Watson, appearing for himself and all others desiring to avail themselves of the said exceptions, the said R. S. Watson appearing by his attorneys, S. O. Thacher and James Grant, and the said assignees, by their attorneys, McComas and McKeighan and C. W. Blair,
7 the said exceptions and objections having been argued and submitted to the court, the court, being fully advised, overruled the said exceptions and objections, to which ruling of the court the said stockholders duly excepted, whereupon an amendment by leave of said court was filed to said petition, whereupon said cause came on for trial, on consideration of which, after argument of counsel, the court being now fully advised and informed concerning the same, it appearing that said rule has been served as directed, adjudges and decrees that the material allegations in said petition and amendment thereto are true; that the capital stock of said bankrupt has become and now is liable to

assessment by this court for the full amount unpaid thereon, for the purpose of paying all claims properly provable in bankruptcy against said bankrupt corporation and the expenses of collecting such assessment and of the bankrupt proceedings, and that it is now necessary to make an assessment of seventy-six dollars on each share of stock to pay the said debts and expenses in the manner prayed for by said assignees. Whereupon, on motion of C. W. Blair and McComas and McKeighan, attorneys of said assignees, it is by the court further ordered, adjudged, and decreed that for the aforesaid purposes a call and assessment be, and the same are hereby, made upon the capital stock and stockholders of the Fort Scott Coal and Mining Company of Kansas, the bankrupt herein, of seventy-six per centum of the par value of said stock, being seventy-six dollars on each every share thereof, upon which call and assessment shall be credited to each stockholder any amounts paid heretofore by him or his assignors for or on said share, and each and every holder of stock in said company is required to pay the amount hereby assessed when called for, viz, seventy-six dollars on each share, less amount already paid to the said G. A. Scovill and T. H. Annable, the assignees of said bankrupt, at the office of Frederic Scoville, a register in bankruptcy in said court in the city of Fort Scott, Kansas, on or before the first day of August, A. D. 1876, and in default of such payment the assignees are directed to sue for and collect the same, and if the amount realized from the said assessments shall prove insufficient for the purpose, the said assignees will report the deficiency for further action thereon. It is further ordered that the said
8 assignees make a call and assessment in accordance herewith, and file the same in this court within twenty days from date hereof, and that they cause a copy thereof, and of this decree, to be served on or mailed to each of said stockholders, directed to him at his usual place of residence as shown by the book and record of said bankrupt, or as may be known by the said assignees, on or before the twenty-first day of July, A. D. 1876, and such notice shall be sufficient, and the affidavit of said assignees, or one of them, shall be sufficient evidence of the facts therein stated in regard to the same.

(Signed) C. G. FOSTER, *Judge.*

And whereas, afterwards, to wit, on the first day of July, A. D. 1876, at, to wit, the said city of Fort Scott, the said assignees did duly make a call and assessment upon the capital stock and stockholders of said company, the time therefor having been duly extended for that purpose by the said district court on the application of said assignees, of the following tenor and effect, viz:

United States district court, Kansas.

In the matter of the Fort Scott Coal and Mining Company, a bankrupt.

*Assessment of stock.*

In pursuance of the order of the court made herein on the tenth day of June, 1876, and under and by virtue thereof, and of the authority vested in us as assignees in bankruptcy of the Fort Scott Coal and Mining Company of Kansas, a bankrupt.

We, as such assignees, do hereby make an assessment and call upon the capital stock and stockholders of said corporation, a bankrupt, to

the amount of seventy-six per cent. of the par value of the stock held by each of such stockholders upon each share thereof. Upon which call and assessment there shall be credited to each stockholder any amount that may have been paid upon any share of stock held by him.

9 This assessment is made for the purpose of raising money to pay the debts and liabilities incurred by said corporation and company in the course of its business, and the costs and expenses of the said bankruptcy, and of the proceedings herein, and the collection of this assessment, and the necessity authorizing and requiring such assessment is now declared to have arisen, and each of the stockholders of said company of said corporation is hereby ordered and required to pay the amount hereby assessed and called for from him, at the office of Frederick Scovill, in the city of Fort Scott, Kansas, one of the registers in bankruptcy of said court, on or before the first day of August, A. D. 1876.

Fort Scott, Kansas, July 1, 1876.

G. A. SCOVILL.
T. H. ANNABLE.

And whereas one R. S. Watson, one of the stockholders of said bankrupt company, appeared for himself and the other stockholders, at the hearing of said application and petition and objected to said call and assessment, and afterwards the said R. S. Watson filed a petition in the circuit court of the United States for the district of Kansas, for the review of the said order of the said district court of the United States, which was argued before Hon. John F. Dillon, judge of said court, at chambers, on consideration of which the said Hon. John F. Dillon, at the city of Topeka in said district, on, to wit, the twenty-ninth day of November, A. D. 1876, made an order affirming in all things said order of the said district court, with the modification that the said district court enter an order allowing to each stockholder of said bankrupt company, who should pay the amount of said call and assessment on his stock in ninety days from the said twenty-ninth day of November, A. D. 1876, a credit on his or her proportion of the amount so as aforesaid assessed, as was included for the purpose of paying the cost of enforcing by suit the collection of said assessment, the amount to be credited to be ascertained by the said district court, to which court the matter, together with said order, was remanded, which said order of the said Hon. John F. Dillon was of the following tenor and effect:

10 In the circuit court of the United States, district of Kansas.

In the matter of the petition of R. S. Watson, for himself and others, to review the assessment of the unpaid stock of the Fort Scott Coal and Mining Company of Kansas, a bankrupt made by the United States district court of Kansas, the tenth day of June, A. D. 1876, on the application of G. A. Scovill and T. H. Annable, assignees of said bankrupt.

Now, at this day came the said petitioners, by Grant and Smith, their attorneys, and the said assignees by their attorneys, McComas and McKeighan and C. W. Blair, whereupon the said court rendered its decision on said petition of review heretofore submitted by consent of said parties in vacation to Hon. John F. Dillon, judge of said court, and directed the following order to be made, viz, that the said order and decree of assessment of stock sought to be reversed by said petition

for review be, and the same is hereby, affirmed in all things, with this modification, that the said district court enter an order allowing each stockholder of said bankrupt company who shall pay the amount of said assessment on his stock without suit, in ninety days from this twenty-ninth day of November, A. D. 1876, a credit on his or her proportion of the amount so assessed, as was included in said assessment, for the purpose of paying the costs of enforcing by suit the collection of said assessment, the amount to be so credited in conformity with this order to be ascertained by the said district court, to which court the matter, together with this order, is hereby remanded.

(Signed) JOHN F. DILLON, *Judge.*

And whereas, afterwards, the said district court of Kansas, sitting in bankruptcy, at, to wit, the city of Topeka, on, to wit, the fourth day of December, A. D. 1876, on application of the said assignees to ascertain the amount to be credited according to said order of said circuit judge, determined and ascertained the amount to be credited to be ten per cent. of the amount so as aforesaid assessed against the capital stock of said bankrupt, and ordered that there be and there was thereby
11 allowed a credit of said ten per cent. in favor of any stockholder who should, within ninety days from the said twenty-ninth day of November, A. D. 1876, pay the amount so as aforesaid assessed against him, less said credit, and said assignees were directed within thirty days to send a copy of said order by mail to the address of each stockholder of said bankrupt, as shown by the books of said company, which said order was of the following tenor and effect, to wit:

In the district court of the United States, district of Kansas.

In the matter of the assessment on unpaid stock of the Fort Scott Coal and Mining Company, a bankrupt, at Topeka, in said district.

Present, Hon. C. G. Foster, judge of said court; J. C. Wilson, clerk; Charles Miller, marshal.

DECEMBER 4, A. D. 1876.

Now, at this day, came on for hearing the application of G. A. Scovill and T. H. Annable, assignees of the said bankrupt, appearing by McComas and McKeighan and C. W. Blair, their attorneys, and it being represented in said application and shown on the hearing thereof that R. S. Watson, one of said company's stockholders, appearing for himself and others to resist the assessment on the unpaid stock of said company, made, on the tenth day of June, A. D. 1876, subsequent thereto, sought by petition in review directed to Hon. John F. Dillon, judge of the circuit court of the United States for Kansas, to reverse and set aside the said assessment, and it appearing and being shown that the said Hon. John F. Dillon, judge of said court, at Topeka, in said district, on the twenty-ninth day of November, A. D. 1876, after hearing the same, affirmed said assessment in all things with this modification, that this court enter an order allowing a credit on the said unpaid stock in favor of each stockholder who in ninety days from the twenty-ninth day of November, A. D. 1876, should pay without suit the amount chargeable against him or her by virtue of said assessment, said credit to be equal to the amount included in said assessment for the cost and expenses of enforcing by suit said assessment, which amount was directed to be ascertained by this court. Now, then,

it being represented and shown by said assignees that not more than ten per cent. of the said assessment was included for said purpose, and that a credit of such amount would be just, it is ordered and directed that there be and there is hereby allowed a credit of ten per cent. on the amount chargeable to each stockholder by virtue of said assessment, who shall in ninety days from the twenty-ninth day of November, A. D. 1876, pay the amount due on said assessment and call less said credit according to the terms thereof. The said assignees are directed to send within thirty days a copy of this order by mail to the address of said stockholders of said bankrupt as shown by the books thereof, postage prepaid.

(Signed) C. G. FOSTER, *Judge.*

And whereas the said defendant did not pay the amount so as aforesaid assessed against him within said ninety days, nor any part thereof; The said assignees aver that notice as required by said orders has been served.

And whereas the said defendant by reason of the premises is now indebted and bound thereon to the plaintiffs as assignees as aforesaid seventy-six per cent. of each share so as aforesaid held by him or seventy-six dollars on each share, less 9,400 dollars heretofore as aforesaid paid by defendant upon said shares, to wit, for the sum of, to wit, twelve thousand two hundred and sixty dollars.

And being so indebted and bound the said defendant afterwards, to wit, Feb. 27, A. D. 1877, at, to wit, the city of Fort Scott, having become bound as aforesaid to pay, undertook and promised the plaintiffs as assignees aforesaid to pay them the said last-named sum of money on request, which time has long since elapsed.

Yet the said defendant, although often requested, has not paid the said sum of money or any part thereof, but has wholly neglected and refused so to do.

2D COUNT.—And whereas also the said defendant heretofore on, to wit, the 4th day of November, A. D. 1872, at, to wit, the city of Fort Scott, Kansas, became the holder and owner of, to wit, two hun-

13 dred & eighty-five shares of one hundred dollars each of the capital stock of the Fort Scott Coal and Mining Company, upon which had been paid 9,400 dollars, the residue and balance due thereon, to wit, 12,260 dollars, being subject to assessment and call of said company, its board of directors, agents, or creditors, or assignees in bankruptcy, whenever thereafterwards the same should be required to meet the liabilities of said company.

And whereas the said Fort Scott Coal and Mining Company became unable to meet its liabilities, which still remain unpaid, and whereas in consequence thereof, on, to wit, the eleventh day of April, A. D. 1874, the said company was duly adjudged a bankrupt by the judgment and order of the district court of the United States for the district of Kansas, on petition theretofore filed in said court by Goodlander, Currier & Co., of Fort Scott, Kansas, creditors of said company.

And whereas, afterwards, to wit, on the twenty-ninth day of April, A. D. 1874, the said Gustavus A. Scovill and Thomas H. Annable were elected and appointed the assignees of the estate of said bankrupt, in pursuance of the act of Congress in such cases made and provided, and a deed of assignment of said estate was afterwards, on, to wit, the fourth day of May, A. D. 1874, duly executed and delivered to said assignees under the bankrupt law.

And whereas the said United States district court, sitting in bankruptcy, did, on petition duly filed for that purpose, on, to wit, the tenth day of June, A. D. 1876, adjudge that a necessity existed for an assessment and call of seventy-six per cent. on the capital stock of said bankrupt company, less a credit of whatever already had been paid thereon by the several stockholders, to meet the outstanding debts and liabilities of said company, and that said seventy-six per cent., less said credit, be paid by the said stockholders to the said plaintiffs, as aforesaid, on or before the, to wit, the first day of August, A. D. 1876, at, to wit, the office of Hon. Frederick A. Scoville, one of the registers in bankruptcy for said district, in the said city of Fort Scott, Kansas, and that the said assignees make a call and assessment on said capital stock of said amount, within twenty days from the said tenth day of June, A. D. 1876,

14 and file the same in said court, and that the said assignees cause a copy of said order and assessment to be served on or mailed to each of the stockholders of said bankrupt, as shown by the books and records of said company, on or before the twenty-first day of July, A. D. 1876, and whereas on the, to wit, the first day of July, A. D. 1876, the said assignees did make said call and assessment, the time therefor having been duly extended by order of said district court.

And whereas on the, to wit, the twenty-ninth day of November, A. D. 1876, the Hon. John F. Dillon, on hearing of a petition in review filed by one R. S. Watson, one of the said bankrupt's stockholders, to reverse or modify said order of said district court, did make an order that the said order, call and assessment of said district court be affirmed with the modification that a credit of such amount as was included in said call and assessment for the cost of enforcing by suit the collection of the same be allowed to each stockholder who would pay the amount assessed as aforesaid against him, less said credit, within ninety days from the said twenty-ninth day of November, A. D. 1876, said credit to be ascertained by the said district court; to which court the matter, together with said order, was remanded.

And whereas, on the fourth day of December, A. D. 1876, the said district court on the application of the said assignees did ascertain and determine that said credit should be ten per cent. of the amount theretofore assessed against said capital stock, and ordered that said credit should be, and the same was thereby, allowed to each stockholder who in ninety days from the said twenty-ninth day of November, A. D. 1876, should pay to the said assignees, as required by order of the tenth day of June, A. D. 1876, the amount assessed against his stock, less said credit, and ordered said assignees within thirty days from the said fourth day of December, A. D. 1876, to mail a copy of said order to each of said stockholders at his residence, as shown by the books of said company.

And whereas the said defendant did not, within said ninety days from said twenty-ninth day of November, A. D. 1876, pay any part of the aforesaid amount so as aforesaid assessed against him, to wit, the sum of twelve thousand two hundred & sixty dollars, said assignees aver that notice has been given to each of the stockholders, as shown by the books and records of said company.

15 By means whereof the said defendant became liable, and was and is liable to pay said plaintiffs a large sum of money, to wit, seventy-six per cent., or seventy-six dollars on each of the aforesaid shares so as aforesaid held by defendant, less a credit of fifty dollars so as aforesaid paid on each of said shares, to wit, three thousand four hundred and ten dollars, and being so liable, the said defendant, in consideration

thereof afterwards, on, to wit, the twenty-seventh day of February, A. D. 1877, undertook and promised the plaintiffs as assignees as aforesaid to pay them the said aforesaid sum of money on request, and which, though often requested, the said wholly neglects and refuses to pay.

16 3D COUNT.—Gustavus A. Scovill and Thomas H. Annable, who are assignees of the Fort Scott Coal and Mining Company of Kansas, a corporation heretofore created and existing under the laws of the State of Kansas, and having its principal office and place of business at the city of Fort Scott, in the State of Kansas, which said corporation has been heretofore, by the order and judgment of the district court of the United States, for the district of Kansas, sitting as a court of bankruptcy, adjudged a bankrupt in accordance with the act of Congress approved March 2, 1867, and the amendments thereto, by McComas and McKeighan and C. W. Blair, their attorneys, complain of said defendant in this action, and who has been duly summoned.

For that whereas the said Fort Scott Coal and Mining Company, being a corporation created, to wit, on the tenth day of June, A.
17 D. 1870, and existing under and in pursuance of the general corporation laws of Kansas, and by virtue of an act of the legislature of the State of Kansas entitled "An act concerning private corporations," approved March 6, 1862, and amendments thereto, for the purpose of mining and digging coal and other minerals, and of buying and selling the same in the county of Bourbon, State of Kansas, and such other counties in said State and elsewhere as might be deemed necessary, and deriving profit to its stockholders from its said business, and having at and before said adjudication in bankruptcy, and holding itself out as having and doing business, as having a capital stock of four hundred thousand dollars, all of which was at and before said date of adjudication subscribed for, and was taken and held by its several stockholders, which said capital stock was divided into shares of one hundred dollars each; and whereas heretofore, to wit, on Oct. 29th, 1872, the said defendant at, to wit, the said city of Fort Scott, Kansas, became the legal owner and holder, at his special instance and request, of one hundred & thirty-five shares of one hundred dollars each of the capital stock of said Fort Scott Coal and Mining Company, upon which defendant paid a small sum, to wit, fifty per cent. thereof, or $6,750, the residue and balance thereof being subject to call and assessment of the said company, its board of directors, agents or creditors, or assignees in bankruptcy, whenever thereafter the same should be required to pay the debts and liabilities of said corporation.

And whereas, to wit, on the 29th day of October, A. D. 1872, the said Fort Scott Coal and Mining Company, at, to wit, the said city of Fort Scott, did make, execute and deliver to the said defendant a certificate of, to wit, one hundred & thirty-five shares of its capital stock, which the said defendant had as aforesaid become the owner of, which said certificate was taken and accepted by the said defendant, whereby the said defendant became and was a stockholder in said corporation to the extent of the shares aforesaid apportioned and set over to the said defendant, whereby the said defendant became and has ever since continued to be a stockholder in said company.

18 And whereas, afterwards, the said Fort Scott Coal and Mining Company became unable to meet its liabilities, and upon a petition filed in bankruptcy, in said district court of the United States for the district of Arkansas, on, to wit, the second day of April, A. D. 1874, by Goodlander, Currier & Co., creditors of said company, against the

said Fort Scott Coal and Mining Company, the said company was afterwards on, to wit, the eleventh day of April, A. D. 1874, duly adjudged a bankrupt by the said district court, in pursuance of the acts of Congress of the United States in such cases made and provided, as more fully appears by the records thereof.

And whereas, afterwards, on, to wit, the twenty-ninth day of April, A. D. 1874, the said Gustavus A. Scovill and Thomas H. Annable were at a meeting of the creditors of said company duly held at, to wit, the said city of Fort Scott, duly elected assignees of the estate of said company in conformity with law, and on, to wit, the fourth day of May, A. D. 1874, a deed of assignment of all the estate, effects and property of the said Fort Scott Coal and Mining Company was executed in due form of law at, to wit, said district of Kansas, which said deed was delivered to the said assignees so elected and appointed assignees as aforesaid, thereby vesting in them the estate, effects, and property of said bankrupt.

And whereas the United States district court for the district of Kansas, on the application and petition of the said assignees of the estate of said bankrupt, of which application the several stockholders had notice, to wit, on the tenth day of June, A. D. 1876, made and entered of record in said court a call and assessment upon the capital stock of said company and the stockholders thereof, for the
19 purpose of raising money to pay the debts of said company, a necessity having arisen for such an assessment, and said court so adjudging, of seventy-six per cent. on each share of capital stock of said company or seventy-six dollars on each share, less a credit of whatever had been before that time paid on said stock by each of the stockholders or the assignor of any stockholder, and directed the same to be paid as hereinafter set forth on, to wit, on or before the first day of August, A. D. 1876, at, to wit, the office of the Hon. Frederick A. Scoville, in the city of Fort Scott, which said call, assessment, and order was of the following tenor and effect:

In the district court of the United States, district of Kansas.

FRIDAY, *June* 10, A. D. 1876.

Present: The Hon. C. G. Foster, judge.

In the matter of the Fort Scott Coal and Mining Company, a bankrupt, on petition of its assignees, G. A. Scovill and T. H. Annable, *its assignees*, for an order and decree to assess the stockholders.

The said assignees having heretofore, viz, thirty-first day of March, A. D. 1876, filed their petition in said court, setting forth the condition of its assets, liabilities and resources, with a statement of amount of unpaid stock, names, and residence of stockholders, and a rule having been made by said court on said filing of said petition, requiring the said stockholders to show cause why an assessment should not be made according to the prayer of said petition, which said rule was made returnable on the twenty-first day of April, A. D. 1876, and extended to this day, viz, the tenth day of June, 1876, by consent of stockholders and said assignees and the order of this court, the said cause came on for hearing, etc., on the exceptions and objections of stockholder, R. S. Watson, appearing for himself and all others desiring to avail themselves of the said exceptions, the said R. S. Watson, appearing by his attorneys, S. O. Thacher and James Grant, and the said assignees by their attorneys, McComas and McKeighan and C. W. Blair,

the said exceptions and objections having been argued and submitted to the court, the court, being fully advised, overruled the said exceptions and objections, to which ruling of the court the said stockholders duly excepted, whereupon an amendment by leave of said court was filed to said petition, whereupon said cause came on for trial, on consideration of which, after argument of counsel, the court being now fully advised and informed concerning the same, it appearing that said rule has been served as directed, adjudges and decrees that the material allegations in said petition and amendment thereto are true; that the capital stock of said bankrupt has become and now is liable to assessment by this court for the full amount unpaid thereon, for the purpose of paying all claims properly provable in bankruptcy against said bankrupt corporation and the expenses of collecting such assessment and of the bankrupt proceedings, and that it is now necessary to make an assessment of seventy-six dollars on each share of stock to pay the said debts and expenses in the manner prayed for by said assignees. Whereupon, on motion of C. W. Blair and McComas and McKeighan, attorneys of said assignees, it is by the court further ordered, adjudged, and decreed that for the aforesaid purposes a call and assessment be, and the same are hereby, made upon the capital stock and stockholders of the Fort Scott Coal and Mining Company of Kansas, the bankrupt herein, of seventy-six per centum of the par value of said stock, being seventy-six dollars on each, every share thereof, upon which call and assessment shall be credited to each stockholder any amounts paid heretofore by him or his assignors for or on said share; and each and every holder of stock in said company is required to pay the amount hereby assessed when called for, viz, seventy-six dollars on each share, less amount already paid, to the said G. A. Scovill and T. H. Annable, the assignees of said bankrupt, at the office of Frederic Scoville, a register in bankruptcy in said court in the city of Fort Scott, Kansas, on or before the first day of August, A. D. 1876, and in default of such payment the assignees are directed to sue for and collect the same, and if the amount realized from the said assessments shall prove insufficient for the purpose the said assignees will report the deficiency for further action thereon. It is further ordered that the said assignees make a call and assessment in accordance herewith, and file the same in this court within twenty days from date hereof, and that they cause a copy thereof and of this decree to be served on or mailed to each of said stockholders, directed to him at his usual place of residence, as shown by the book and record of said bankrupt, or as may be known by the said assignees, on or before the twenty-first day of July, A. D. 1876, and such notice shall be sufficient, and the affidavit of said assignees, or one of them, shall be sufficient evidence of the facts therein stated in regard to the same.

(Signed) C. G. FOSTER, *Judge*.

And whereas, afterwards, to wit, on the first day of July, A. D. 1876, at, to wit, the said city of Fort Scott, the said assignees did duly make a call and assessment upon the capital stock and stockholders of said company, the time therefor having been duly extended for that purpose by the said district court on the application of said assignees, of the following tenor and effect, viz:

United States district court, Kansas.

In the matter of the Fort Scott Coal and Mining Company, a bankrupt.

*Assessment of stock.*

In pursuance of the order of the court made herein on the tenth day of June, 1876, and under and by virtue thereof, and of the authority vested in us as assignees in bankruptcy of the Fort Scott Coal and Mining Company of Kansas, a bankrupt,

We, as such assignees, do hereby make an assessment and call upon the capital stock and stockholders of said corporation, a bankrupt, to the amount of seventy-six per cent. of the par value of the stock held by each of such stockholders upon each share thereof. Upon which call and assessment there shall be credited to each stockholder any amount that may have been paid upon any share of stock held by him.

22 This assessment is made for the purpose of raising money to pay the debts and liabilities incurred by said corporation and company in the course of its business, and the costs and expenses of the said bankruptcy and of the proceedings herein and the collection of this assessment; and the necessity authorizing and requiring such assessment is now declared to have arisen, and each of the stockholders of said company of said corporation is hereby ordered and required to pay the amount hereby assessed and called for from him, at the office of Frederick Scovill, in the city of Fort Scott, Kansas, one of the registers in bankruptcy of said court, on or before the first day of August, A. D. 1876.

Fort Scott, Kansas, July 1, 1876.

G. A. SCOVILL.
T. H. ANNABLE.

And whereas one R. S. Watson, one of the stockholders of said bankrupt company, appeared for himself and the other stockholders at the hearing of said application and petition and objected to said call and assessment, and afterwards the said R. S. Watson filed a petition in the circuit court of the United States for the district of Kansas for the review of the said order of the said district court of the United States, which was argued before Hon. John F. Dillon, judge of said court, at chambers, on consideration of which the said Hon. John F. Dillon, at the city of Topeka, in said district, on, to wit, the twenty-ninth day of November, A. D. 1876, made an order affirming in all things said order of the said district court, with the modification that the said district court enter an order allowing to each stockholder of said bankrupt company, who should pay the amount of said call and assessment on his stock in ninety days from the said twenty-ninth day of November, A. D. 1876, a credit on his or her proportion of the amount so as aforesaid assessed, as was included for the purpose of paying the cost of enforcing by suit the collection of said assessment, the amount to be credited to be ascertained by the said district court, to which court the matter, together with said order, was remanded, which said order of the said Hon. John F. Dillon was of the following tenor and effect.

23 In the circuit court of the United States, district of Kansas.

In the matter of the petition of R. S. Watson, for himself and others, to review the assessment of the unpaid stock of the Fort Scott Coal and Mining Company of Kansas, a bankrupt, made by the United States district court of Kansas, the tenth day of June, A. D. 1876, on the application of G. A. Scovill and T. H. Annable, assignees of said bankrupt.

Now at this day came the said petitioners by Grant and Smith, their attorneys, and the said assignees, by their attorneys, McComas and McKeighan and C. W. Blair, whereupon the said court rendered its decision on said petition of review heretofore submitted by consent of said parties in vacation to Hon. John F. Dillon, judge of said court, and directed the following order to be made, viz: That the said order and decree of assessment of stock sought to be reversed by said petition for review be, and the same is hereby, affirmed in all things with this modification: That the said district court enter an order allowing each stockholder of said bankrupt company who shall pay the amount of said assessment on his stock without suit, in ninety days from this twenty-ninth day of November, A. D. 1876, a credit on his or her proportion of the amount so assessed, as was included in said assessment, for the purpose of paying the costs of enforcing by suit the collection of said assessment, the amount to be so credited in conformity to this order, to be ascertained by the said district court; to which court the matter, together with this order, is hereby remanded.

(Signed) JOHN F. DILLON, *Judge.*

And whereas afterwards the said district court of Kansas, sitting in bankruptcy at, to wit, the city of Topeka on, to wit, the fourth day of December, A. D. 1876, on application of the said assignees to ascertain the amount to be credited according to said order of said circuit judge, determined and ascertained the amount to be credited to be ten per cent. of the amount so as aforesaid assessed against the capital stock of said bankrupt, and ordered that there be and there was thereby allowed a credit of said ten per cent. in favor of any stockholder who should, within ninety days from the said twenty-ninth day of November, A. D. 1876, pay the amount so as aforesaid assessed against him, less said credit, and said assignees were directed within thirty days to send a copy of said order by mail to the address of each stockholder of said bankrupt, as shown by the books of said company; which said order was of the following tenor and effect, to wit:

24

In the district court of the United States, district of Kansas.

In the matter of the assessment on unpaid stock of the Fort Scott Coal and Mining Company, a bankrupt, at Topeka, in said district.

Present, Hon. C. G. Foster, judge of said court; J. C. Wilson, clerk; Charles Miller, marshal.

DECEMBER 4, A. D. 1876.

Now at this day came on for hearing the application of G. A. Scovill and T. H. Annable, assignees of the said bankrupt, appearing by McComas and McKeighan and C. W. Blair, their attorneys, and it being represented in said application and shown on the hearing thereof

that R. S. Watson, one of said company's stockholders, appearing for himself and others to resist the assessment on the unpaid stock of said company, made on the tenth day of June, A. D. 1876, subsequent thereto, sought by petition in review directed to Hon. John F. Dillon, judge of the circuit court of the United States for Kansas, to reverse and set aside the said assessment, and it appearing and being shown that the said Hon. John F. Dillon, judge of said court at Topeka, in said district, on the twenty-ninth day of November, A. D. 1876, after hearing the same, affirmed said assessment in all things, with this modification, that this court enter an order allowing a credit on the said unpaid stock in favor of each stockholder who, in ninety days from the twenty-ninth day of November, A. D. 1876, should pay without suit the amount chargeable against him or her by virtue of said assessment, said credit to be equal to the amount included in said assessment for the cost and expenses of enforcing by suit said assessment, which amount was directed to be ascertained by this court. Now, then, it being
25 represented and shown by said assignees that not more than ten per cent. of the said assessment was included for said purpose, and that a credit of such amount would be just, it is ordered and directed that there be and there is hereby allowed a credit of ten per cent. on the amount chargeable to each stockholder by virtue of said assessment who shall, in ninety days from the twenty-ninth day of November, A. D. 1876, pay the amount due on said assessment and call, less said credit, according to the terms thereof. The said assignees are directed to send, within thirty days, a copy of this order, by mail, to the address of said stockholders of said bankrupt, as shown by the books thereof, postage prepaid.

(Signed) C. G. FOSTER, *Judge.*

And whereas the said defendant did not pay the amount so as aforesaid assessed against him within said ninety days, nor any part thereof,

The said assignees aver that notice, as required by said orders, has been served.

And whereas the said defendant, by reason of the premises, is now indebted and bound thereon to the plaintiffs, as assignees as aforesaid, seventy-six per cent. of each share so as aforesaid held by him, or seventy-six dollars on each share, less 6,750 dollars heretofore as aforesaid, paid by defendant upon said shares, to wit, for the sum of, to wit, three thousand five hundred and ten dollars.

And being so indebted and bound the said defendant afterwards, to wit, Feb. 27, A. D. 1877, at, to wit, the city of Fort Scott, having become bound as aforesaid to pay, undertook and promised the plaintiffs as assignees aforesaid to pay them the said last-named sum of money on request, which time has long since elapsed.

Yet the said defendant, although often requested, has not paid the said sum of money or any part thereof, but has wholly neglected and refused so to do.

3D COUNT.—And whereas also the said defendant heretofore on, to wit, the 29th day of October, A. D. 1872, at, to wit, the city of Fort Scott, Kansas, being the holder and owner of, to wit, one hundred & thirty-five shares of one hundred dollars each of the capital
26 stock of the Fort Scott Coal and Mining Company, upon which had been paid fifty per cent. or fifty dollars upon each share the residue and balance due thereon, to wit, fifty per cent. thereon being subject to assessment and call of said company, its board of

directors, agents, or creditors, or assignees in bankruptcy, whenever thereafterwards the same should be required to meet the liabilities of said company.

And whereas the said Fort Scott Coal and Mining Company became unable to meet its liabilities, which still remain unpaid, and whereas in consequence thereof on, to wit, the eleventh day of April, A. D. 1874, the said company was duly adjudged a bankrupt by the judgment and order of the district court of the United States for the district of Kansas, on petition theretofore filed in said court by Goodlander, Currier & Co., of Fort Scott, Kansas, creditors of said company.

And whereas afterwards, to wit, on the twenty-ninth day of April, A. D. 1874, the said Gustavus A. Scovill and Thomas H. Annable were elected and appointed the assignees of the estate of said bankrupt, in pursuance of the act of Congress in such cases made and provided, and a deed of assignment of said estate was afterwards, on, to wit, the fourth day of May, A. D. 1874, duly executed and delivered to said assignees under the bankrupt law.

And whereas the said United States district court, sitting in bankruptcy, did, on petition duly filed for that purpose, on, to wit, the tenth day of June, A. D. 1876, adjudge that a necessity existed for an assessment and call of seventy-six per cent. on the capital stock of said bankrupt company, less a credit of whatever already had been paid thereon by the several stockholders, to meet the outstanding debts and liabilities of said company, and that said seventy-six per cent., less said credit, be paid by the said stockholders to the said plaintiffs, as aforesaid, on or before the, to wit, the first day of August, A. D. 1876, at, to wit, the office of Hon. Frederick A. Scoville, one of the registers in bankruptcy for said district, in the said city of Fort Scott, Kansas, and that the said assignees make a call and assessment on said capital stock of said amount within twenty
27 days from the said tenth day of June, A. D. 1876, and file the same in said court, and that the said assignees cause a copy of said order and assessment to be served on or mailed to each of the stockholders of said bankrupt, as shown by the books and records of said company, on or before the twenty-first day of July, A. D. 1876; and whereas on the, to wit, the first day of July, A. D. 1876, the said assignees did make said call and assessment, the time therefor having been duly extended by the order of said district court.

And whereas on the, to wit, the twenty-ninth day of November, A. D. 1876, the Hon. John F. Dillon, on hearing of a petition in review filed by one R. S. Watson, one of the said bankrupt's stockholders, to reverse or modify said order of said district court, did make an order that the said order, call and assessment of said district court be affirmed, with the modification that a credit of such amount as was included in said call and assessment for the cost of enforcing by suit the collection of the same be allowed to each stockholder who would pay the amount assessed as aforesaid against him, less said credit, within ninety days from the said twenty-ninth day of November, A. D. 1876, said credit to be ascertained by the said district court, to which court the matter together with said order was remanded.

And whereas on the fourth day of December, A. D. 1876, the said district court, on the application of the said assignees, did ascertain and determine that said credit should be ten per cent. of the amount theretofore assessed against said capital stock, and ordered that said credit should be and the same was thereby allowed to each stockholder who, in ninety days from the said twenty-ninth day of November, A.

D. 1876, should pay to the said assignees, as required by order of the tenth day of June, A. D. 1876, the amount assessed against his stock, less said credit, and ordered said assignees, within thirty days from the said fourth day of December, A. D. 1876, to mail a copy of said order to each of said stockholders at his residence, as shown by the books of said company.

And whereas the said defendant did not, within said ninety days from said twenty-ninth day of November, A. D. 1876, pay any part of the aforesaid amount so as aforesaid assessed against him, to wit, the sum of three thousand five hundred & ten dollars, said assignees aver that notice has been given to each of the stockholders, as shown by the books and records of said company.

28 By means whereof the said defendant became liable, and was and is liable, to pay said plaintiffs a large sum of money, to wit, seventy-six per cent., or seventy-six dollars on each of the aforesaid shares so as aforesaid held by defendant, less a credit of 9,400 dollars so as aforesaid paid on said shares, to wit, 12,260 dollars, and being so liable, the said defendant, in consideration thereof, afterwards, on, to wit, the twenty-seventh day of February, A. D. 1877, undertook and promised the plaintiffs, as assignees as aforesaid, to pay them the said last-named sum of money on request, and which, though often requested, the said defendant wholly neglects and refuses to pay.

29 4TH COUNT.—Gustavus A. Scovill and Thomas H. Annable, who are assignees of the Fort Scott Coal and Mining Company of Kansas, a corporation heretofore created and existing under the laws of the State of Kansas, and having its principal office and place of business at the city of Fort Scott, in the State of Kansas, which said corporation has been heretofore, by the order and judgment of the district court of the United States for the district of Kansas, sitting as a court of bankruptcy, adjudged a bankrupt in accordance with the act of Congress approved March 2, 1867, and the amendments thereto, by M'Comnas and M'Keighan and C. W. Blair, their attorneys, complain of said defendant in this action, and who has been duly summoned, etc.

For that whereas the said Fort Scott Coal and Mining Company,

30 being a corporation created, to wit, on the tenth day of June, A. D. 1870, and existing under and in pursuance of the general corporation laws of Kansas, and by virtue of an act of the legislature of the State of Kansas entitled "An act concerning private corporations," approved March 6, 1862, and amendments thereto, for the purpose of mining and digging coal and other minerals, and of buying and selling the same in the county of Bourbon, State of Kansas, and such other counties in said State and elsewhere as might be deemed necessary, and deriving profit to its stockholders from its said business, and having at and before said adjudication in bankruptcy, and holding itself out as having and doing business, as having a capital stock of four hundred thousand dollars, all of which was at and before said date of adjudication subscribed for, and was taken and held by its several stockholders, which said capital stock was divided into shares of one hundred dollars each; and whereas, heretofore, to wit, on January 8, 1873, the said defendant at, to wit, the said city of Fort Scott, Kansas, became the legal owner and holder, at his special instance and request, of four hundred & fifty shares, of one hundred dollars each, of the capital stock of said Fort Scott Coal and Mining Company, upon which defendant paid a small sum, to wit, fifty per cent. thereof, or $2,250, the residue and balance thereof being subject to call and assess-

ment of the said company, its board of directors, agents, or creditors, or assignees in bankruptcy whenever thereafter the same should be required to pay the debts and liabilities of said corporation.

And whereas, to wit, on the 8th day of January, A. D. 1873, the said Fort Scott Coal and Mining Company at, to wit, the said city of Fort Scott, did make, execute, and deliver to the said defendant a certificate of, to wit, four hundred & fifty shares of its capital stock, which the said defendant had, as aforesaid, become the owner of, which said certificate was taken and accepted by the said defendant, whereby the said def't became and was a stockholder in said corporation to the extent of the shares aforesaid apportioned and set over to the said def't, whereby the said def't became and has ever since continued to be a stockholder in said company.

31 And whereas the said defendant at the said date of adjudication in bankruptcy was still the owner of said shares so as aforesaid set over to him.

And whereas afterwards the said Fort Scott Coal and Mining Company became unable to meet its liabilities, and upon a petition filed in bankruptcy in said district court of the United States for the district of Kansas on, to wit, the second day of April, A. D. 1874, by Goodlander, Currier & Co., creditors of said company, against the said Fort Scott Coal and Mining Company, the said company was afterwards on, to wit, the eleventh day of April, A. D. 1874, duly adjudged a bankrupt by the said district court, in pursuance of the acts of Congress of the United States in such cases made and provided, as more fully appears by the records thereof.

And whereas afterwards on, to wit, the twenty-ninth day of April, A. D. 1874, the said Gustavus A. Scovill and Thomas H. Annable were at a meeting of the creditors of said company duly held at, to wit, the said city of Fort Scott, duly elected assignees of the estate of said company in conformity with law, and on, to wit, the fourth day of May, A. D. 1874, a deed of assignment of all the estate, effects, and property of the said Fort Scott Coal and Mining Company was executed in due form of law at, to wit, said district of Kansas, which said deed was delivered to the said assignees so elected and appointed assignees as aforesaid, thereby vesting in them the estate, effects, and property of said bankrupt.

And whereas the United States district court for the district of Kansas, on the application and petition of the said assignees of the estate of said bankrupt, of which application the several stockholders had notice, to wit, on the tenth day of June, A. D. 1876, made and entered of record in said court a call and assessment upon the capital

32 stock of said company and the stockholders thereof, for the purpose of raising money to pay the debts of said company, a necessity having arisen for such an assessment, and said court so adjudging, of seventy-six per cent. on each share of capital stock of said company, or seventy-six dollars on each share, less a credit of whatever had been before that time paid on said stock by each of the stockholders or the assignor of any stockholder, and directed the same to be paid as hereinafter set forth on, to wit, on or before the first day of August, A. D. 1876, at, to wit, the office of the Hon. Frederick A. Scoville, in the city of Fort Scott, which said call, assessment, and order was of the following tenor and effect:

In the district court of the United States, district of Kansas.

FRIDAY, *June* 10, *A. D.* 1876.

Present, the Hon. C. G. Foster, judge.

In the matter of the Fort Scott Coal and Mining Company, a bankrupt, on petition of its assignees, G. A. Scovill and T. H. Annable, its assignees, for an order and decree to assess the stockholders.

The said assignees having heretofore, viz, thirty-first day of March, A. D. 1876, filed their petition in said court setting forth the condition of its assets, liabilities, and resources, with a statement of amount of unpaid stock, names, and residence of stockholders, and a rule having been made by said court on said filing of said petition requiring the said stockholders to show cause why an assessment should not be made according to the prayer of said petition, which said rule was made returnable on the twenty-first day of April, A. D. 1876, and extended to this day, viz, the tenth day of June, 1876, by consent of stockholders and said assignees and the order of this court, the said cause came on for hearing, etc., on the exceptions and objections of stockholder R. S. Watson, appearing for himself and all others desiring to avail themselves of the said exceptions, the said R. S. Watson appearing by his attorneys, S. O. Thacher and James Grant, and the said assignees by their attorneys, McComas and McKeighan and C. W. Blair,
33 the said exceptions and objections having been argued and submitted to the court, the court, being fully advised, overruled the said exceptions and objections, to which ruling of the court the said stockholders duly excepted, whereupon an amendment by leave of said court was filed to said petition, whereupon said cause came on for trial, on consideration of which, after argument of counsel, the court being now fully advised and informed concerning the same, it appearing that said rule has been served as directed, adjudges and decrees that the material allegations in said petition and amendment thereto are true; that the capital stock of said bankrupt has become, and now is, liable to assessment by this court for the full amount unpaid thereon for the purpose of paying all claims properly provable in bankruptcy against said bankrupt corporation and the expenses of collecting such assessment and of the bankrupt proceedings, and that it is now necessary to make an assessment of seventy-six dollars on each share of stock to pay the said debts and expenses in the manner prayed for by said assignees. Whereupon, on motion of C. W. Blair and McComas and McKeighan, attorneys of said assignees, it is by the court further ordered, adjudged, and decreed that for the aforesaid purposes a call and assessment be, and the same are hereby, made upon the capital stock and stockholders of the Fort Scott Coal and Mining Company of Kansas, the bankrupt herein, of seventy-six per centum of the par value of said stock, being seventy-six dollars on each, every share thereof, upon which call and assessment shall be credited to each stockholder any amounts paid heretofore by him or his assignors for or on said share, and each and every holder of stock in said company is required to pay the amount hereby assessed when called for, viz, seventy-six dollars on each share, less amount already paid to the said G. A. Scovill and T. H. Annable, the assignees of said bankrupt, at the office of Frederic Scoville, a register in bankruptcy in said court, in the city of Fort Scott, Kansas, on or before the first day of August, A. D. 1876, and in default of such payment the assignees are directed to sue for and collect the same, and

if the amount realized from the said assessment shall prove insufficient for the purpose, the said assignees will report the deficiency for further action thereon. It is further ordered that the said assignees
34 make a call and assessment in accordance herewith, and file the same in this court within twenty days from date hereof, and that they cause a copy thereof and of this decree to be served on or mailed to each of said stockholders, directed to him at his usual place of residence as shown by the book and record of said bankrupt, or as may be known by the said assignees, on or before the twenty-first day of July, A. D. 1876, and such notice shall be sufficient, and the affidavit of said assignees, or one of them, shall be sufficient evidence of the facts therein stated in regard to the same.

(Signed) C. G. FOSTER, *Judge.*

And whereas afterwards, to wit, on the first day of July, A. D. 1876, at, to wit, the said city of Fort Scott, the said assignees did duly make a call and assessment upon the capital stock and stockholders of said company, the time therefor having been duly extended for that purpose by the said district court on the application of said assignees of the following tenor and effect, viz:

United States district court, Kansas.

In the matter of the Fort Scott Coal and Mining Company, a bankrupt.

*Assessment of stock.*

In pursuance of the order of the court made herein on the tenth day of June, 1876, and under and by virtue thereof, and of the authority vested in us as assignees in bankruptcy of the Fort Scott Coal and Mining Company, of Kansas, a bankrupt,

We, as such assignees, do hereby make an assessment and call upon the capital stock and stockholders of said corporation, a bankrupt, to the amount of seventy-six per cent. of the par value of the stock held by each of such stockholders upon each share thereof. Upon which call and assessment there shall be credited to each stockholder any amount that may have been paid upon any share of stock held by him.
35 This assessment is made for the purpose of raising money to pay the debts and liabilities incurred by said corporation and company in the course of its business, and the costs and expenses of the said bankruptcy, and of the proceedings herein, and the collection of this assessment, and the necessity authorizing and requiring such assessment is now declared to have arisen, and each of the stockholders of said company of said corporation is hereby ordered and required to pay the amount hereby assessed and called for from him, at the office of Frederick Scoville, in the city of Fort Scott, Kansas, one of the registers in bankruptcy of said court, on or before the first day of August, A. D. 1876.

Fort Scott, Kansas, July 1, 1876.

G. A. SCOVILL.
T. H. ANNABLE.

And whereas one R. S. Watson, one of the stockholders of said bankrupt company, appeared for himself and the other stockholders, at the hearing of said application and petition, and objected to said call

and assessment, and afterwards the said R. S. Watson filed a petition in the circuit court of the United States for the district of Kansas for the review of the said order of the said district court of the United States, which was argued before Hon. John F. Dillon, judge of said court, at chambers, on consideration of which the said Hon. John F. Dillon, at the city of Topeka, in said district, on, to wit, the twenty-ninth day of November, A. D. 1876, made an order affirming in all things said order of the said district court, with the modification that the said district court enter an order allowing to each stockholder of said bankrupt company who should pay the amount of said call and assessment on his stock in ninety days from the said twenty-ninth day of November, A. D. 1876, a credit on his or her proportion of the amount so as aforesaid assessed, as was included for the purpose of paying the cost of enforcing by suit the collection of said assessment, the amount to be credited to be ascertained by the said district court; to which court the matter, together with said order, was remanded; which said order of the said Hon. John F. Dillon was of the following tenor and effect:

36 In the circuit court of the United States, district of Kansas.

In the matter of the petition of R. S. Watson, for himself and others, to review the assessment of the unpaid stock of the Fort Scott Coal and Mining Company, of Kansas, a bankrupt, made by the United States district court of Kansas, the tenth day of June, A. D. 1876, on the application of G. A. Scovill and T. H. Annable, assignees of said bankrupt.

Now at this day came the said petitioners, by Grant and Smith, their attorneys, and the said assignees by their attorneys, McComas and McKeighan and C. W. Blair, whereupon the said court rendered its decision on said petition of review heretofore submitted by consent of said parties in vacation to Hon. John F. Dillon, judge of said court, and directed the following order to be made, viz, that the said order and decree of assessment of stock sought to be reversed by said petition for review be, and the same is hereby, affirmed in all things, with this modification, that the said district court enter an order allowing each stockholder of said bankrupt company who shall pay the amount of said assessment on his stock without suit, in ninety days from this twenty-ninth day of November, A. D. 1876, a credit on his or her proportion of the amount so assessed as was included in said assessment, for the purpose of paying the costs of enforcing by suit the collection of said assessment, the amount to be so credited in conformity with this order, to be ascertained by the said district court; to which court the matter, together with this order, is hereby remanded.

(Signed) JOHN F. DILLON, *Judge.*

And whereas afterwards the said district court of Kansas, sitting in bankruptcy, at, to wit, the city of Topeka, on, to wit, the fourth day of December, A. D. 1876, on application of the said assignees to ascertain the amount to be credited according to said order of said circuit judge, determined and ascertained the amount to be credited to be ten per cent. of the amount so as aforesaid assessed against the capital stock of said bankrupt, and ordered that there be, and there was
37 thereby, allowed a credit of said ten per cent. in favor of any stockholder who should within ninety days from the said twenty-ninth day of November, A. D. 1876, pay the amount so as aforesaid

assessed against him, less said credit, and said assignees were directed within thirty days to send a copy of said order by mail to the address of each stockholder of said bankrupt, as shown by the books of said company; which said order was of the following tenor and effect, to wit:

In the district court of the United States, district of Kansas.

In the matter of the assessment on unpaid stock of the Fort Scott Coal and Mining Company, a bankrupt, at Topeka, in said district.

Present, Hon. C. G. Foster, judge of said court; J. C. Wilson, clerk; Charles Miller, marshal.

DECEMBER 4, A. D. 1876.

Now at this day came on for hearing the application of G. A. Scoville and T. H. Annable, assignees of the said bankrupt, appearing by McComas and McKeighan and C. W. Blair, their attorneys, and it being represented in said application and shown on the hearing thereof that R. S. Watson, one of said company's stockholders, appearing for himself and others to resist the assessment on the unpaid stock of said company, made on the tenth day of June, A. D. 1876, subsequent thereto, sought by petition in review, directed to Hon. John F. Dillon, judge of the circuit court of the United States for Kansas, to reverse and set aside the said assessment, and it appearing and being shown that the said Hon. John F. Dillon, judge of said court at Topeka, in said district, on the twenty-ninth day of November, A. D. 1876, after hearing the same, affirmed said assessment in all things, with this modification, that this court enter an order allowing a credit on the said unpaid stock in favor of each stockholder who in ninety days from the twenty-ninth day of November, A. D, 1876, should pay without suit the amount chargeable against him or her by virtue of said assessment, said credit to be equal to the amount included in said assessment, for the cost and expenses of enforcing by suit said assessment, which amount was directed to be ascertained by this court. Now, then, it being
38 represented and shown by said assignees that not more than ten per cent. of the said assessment was included for said purpose, and that a credit of such amount would be just, it is ordered and directed that there be, and there is hereby, allowed a credit of ten per cent. on the amount chargeable to each stockholder by virtue of said assessment who shall in ninety days from the twenty-ninth day of November, A. D. 1876, pay the amount due on said assessment and call, less said credit, according to the terms thereof. The said assignees are directed to send within thirty days a copy of this order by mail to the address of said stockholders of said bankrupt, as shown by the books thereof, postage prepaid.

(Signed) C. G. FOSTER, *Judge*.

And whereas the said def't did not pay the amount so as aforesaid assessed against him within said ninety days, nor any part thereof,

The said assignees aver that notice as required by said orders has been served.

And whereas the said def't, by reason of the premises, is now indebted and bound thereon to the plaintiffs, as assignees as aforesaid, seventy-six per cent. of each share so as aforesaid held by him, or seventy-six dollars on each share less 2,250 dollars heretofore as aforesaid paid by def't upon said shares, to wit, for the sum of, to wit, eleven

thousand seven hundred dollars. And being so indebted and bound, the said def't afterwards, to wit, Feb. 27, A. D. 1877, at, to wit, the city of Fort Scott, having become bound as aforesaid to pay, undertook and promised the plaintiffs as assignees aforesaid to pay them the said last-named sum of money on request, which time has long since elapsed.

Yet the said def't, although often requested, has not paid the said sum of money, or any part thereof, but has wholly neglected and refused so to do.

5TH COUNT.—And whereas also the said def't heretofore, on, to wit, the 8th day of Janu'y, A. D. 1873, at, to wit, the city of Fort Scott, Kansas, became the holder and owner of, to wit, four hundred
39 & fifty shares, of one hundred dollars each, of the capital stock of the Fort Scott Coal and Mining Company, upon which had been paid 50 per cent., or 50 dollars upon each share, the residue and balance due thereon, to wit, 50 per cent. thereon, being subject to assessment and call of said company, its board of directors, agents, or creditors, or assignees in bankruptcy, whenever thereafterwards the same should be required to meet the liabilities of said company.

And whereas the said Fort Scott Coal and Mining Company became unable to meet its liabilities, which still remain unpaid, and whereas in consequence thereof, on, to wit, the eleventh day of April, A. D. 1874, the said company was duly adjudged a bankrupt by the judgment and order of the district court of the United States for the district of Kansas, on petition theretofore filed in said court by Goodlander, Currier & Co., of Fort Scott, Kansas, creditors of said company.

And whereas afterwards, to wit, on the twenty-ninth day of April, A. D. 1874, the said George A. Scoville and Thomas H. Annable were elected and appointed the assignees of the estate of said bankrupt, in pursuance of the act of Congress in such cases made and provided, and a deed of assignment of said estate was afterwards, on, to wit, the fourth day of May, A. D. 1874, duly executed and delivered to said assignees under the bankrupt law.

And whereas the said United States district court, sitting in bankruptcy, did, on petition duly filed for that purpose, on, to wit, the tenth day of June, A. D. 1876, adjudge that a necessity existed for an assessment and call of seventy-six per cent. on the capital stock of said bankrupt company, less a credit of whatever already had been paid thereon by the several stockholders, to meet the outstanding debts and liabilities of said company, and that said seventy-six per cent., less said credit, be paid by the said stockholders to the said plaintiffs as aforesaid, on or before the, to wit, the first day of August, A. D. 1876, at, to wit, the office of Hon. Frederick A. Scoville, one of the registers in bankruptcy for said district, in the said city of Fort Scott, Kansas, and that the said assignees make a call and assessment on said capital stock of said amount within twenty days from the said
40 tenth day of June, A. D. 1876, and file the same in said court, and that the said assignees cause a copy of said order and assessment to be served on or mailed to each of the stockholders of said bankrupt, as shown by the books and records of said company, on or before the twenty-first day of July, A. D. 1876; and whereas on the, to wit, the first day of July, A. D. 1876, the said assignees did make said call and assessment, the time therefor having been duly extended by the order of said district court.

And whereas on the, to wit, the twenty-ninth day of November, A. D. 1876, the Hon. John F. Dillon, on hearing of a petition in

review filed by one R. S. Watson, one of the said bankrupt's stockholders, to reverse or modify said order of said district court, did make an order that the said order, call and assessment of said district court be affirmed, with the modification that a credit of such amount as was included in said call and assessment for the cost of enforcing by suit the collection of the same be allowed to each stockholder who would pay the amount assessed as aforesaid against him, less said credit, within ninety days from the said twenty-ninth day of November, A. D. 1876, said credit to be ascertained by the said district court; to which court the matter, together with said order, was remanded.

And whereas on the fourth day of December, A. D. 1876, the said district court, on the application of the said assignees, did ascertain and determine that said credit should be ten per cent. of the amount theretofore assessed against said capital stock, and ordered that said credit should be, and the same was thereby, allowed to each stockholder who in ninety days from the said twenty-ninth day of November, A. D. 1876, should pay to the said assignees, as required by order of the tenth day of June, A. D. 1876, the amount assessed against his stock, less said credit, and ordered said assignees within thirty days from the said fourth day of December, A. D. 1876, to mail a copy of said order to each of said stockholders at his residence, as shown by the books of said company.

And whereas the said def't did not, within said ninety days from said twenty-ninth day of November, A. D. 1876, pay any part of the aforesaid amount so as aforesaid assessed against him, to wit, the sum of eleven thousand seven hundred dollars, said assignees aver that notice has been given to each of the stockholders, as shown by the books and records of said company.

41 By means whereof the said def't became liable, and was and is liable, to pay said plaintiffs a large sum of money, to wit, seventy-six per cent., or seventy-six dollars on each of the aforesaid shares, so as aforesaid held by def't, less a credit of fifty so as aforesaid paid on each of said shares, to wit, eleven thousand seven hundred dollars; and being so liable, the said defendant, in consideration thereof, afterwards, on, to wit, the twenty-seventh day of February, A. D. 1877, undertook and promised the plaintiffs, as assignees, as aforesaid, to pay them the said last-named sum of money on request, and which, though often requested, the said def't wholly neglects and refuses to pay.

6TH COUNT.—Gustavus A. Scovill and Thomas H. Annable, who are assignees of the Fort Scott Coal and Mining Company, a corporation heretofore created and existing under the laws of the State of Kansas, and having its principal office in the city of Fort Scott, within said State, which said corporation has been heretofore by the order and judgment of the district court of the United States for the district of Kansas adjudged a bankrupt, in accordance with the provisions of an act of Congress of the United States, approved March 2, 1867, and the acts amendatory thereto, by McComas and McKeighan and C. W. Blair, their attorneys, complain of the said Nathaniel Thayer, defendant in this action, and who has been duly summoned.

For that whereas the said bankrupt, the Fort Scott Coal and Mining Company, was incorporated and created by said State of Kansas on, to wit, the tenth day of June, 1870, under the general laws of the State of Kansas, and an act of the legislature of the State of Kansas, entitled "An act concerning private corporations," approved March 6,

1862, and acts amendatory thereto, for the purpose of mining, buying, and selling coal, and other objects.

And whereas at and before the date of the adjudication in bankruptcy, on, to wit, the eleventh day of April, A. D. 1874, the said company had a capital stock of four hundred thousand dollars divided into shares of one hundred dollars each, which said capital stock was at, to wit, the day and year last aforesaid and before subscribed for, taken and held by the several stockholders.

42 And whereas the stock of said company so as aforesaid owned and held by the said several stockholders, and the shares thereof, had only been partially paid for in different amounts, amounting in the aggregate, to wit, the sum of one hundred and seventy-seven thousand three hundred and fifty dollars, the balance of which remained, and still remains, unpaid, to wit, in the aggregate two hundred and twenty-two thousand and six hundred and fifty dollars, and was liable to assessment and call by it the said company's board of directors, agents, creditors, or assignees in bankruptcy.

And whereas at said date of adjudication the said def't was, and now is, the owner and holder of eight hundred & seventy shares of the said capital stock of the par value of one hundred dollars, aggregating eighty-seven thousand dollars, on which there had only been paid, to wit, the sum of 38,650 dollars on said shares; balance of forty-eight thousand three hundred and fifty dollars still remained, and remains, unpaid, and liable to be called in for the payment of the debts and liabilities of said company.

43 And whereas afterwards the said Fort Scott Coal and Mining Company became unable to meet its liabilities, and upon a petition filed in bankruptcy in said district court of the United States for the district of Kansas, on, to wit, the second day of April, A. D. 1874, by Goodlander, Currier & Co. creditors of said company, against the said Fort Scott Coal and Mining Company, the said company was afterwards, on, to wit, the eleventh day of April, A. D. 1874, duly adjudged a bankrupt by the said district court, in pursuance of the acts of Congress of the United States in such cases made and provided, as more fully appears by the records thereof.

And whereas afterwards, on, to wit, the twenty-ninthday of April, A. D. 1874, the said Gustavus A. Scovill and Thomas H. Annable were at a meeting of the creditors of said company, duly held at, to wit, the said city of Fort Scott, duly elected assignees of the estate of said company, in conformity with law, and on, to wit, the fourth day of May, A. D. 1874, a deed of assignment of all the estate, effects, and property of the said Fort Scott Coal and Mining Company was executed in due form of law, at, to wit, said district of Kansas, which said deed was delivered to the said assignees so elected and appointed assignees as aforesaid, thereby vesting in them the estate, effects, and property of said bankrupt.

And whereas the United States district court for the district of Kansas, on the application and petition of the said assignees of the estate of said bankrupt, of which application the several stockholders had notice, to wit, on the tenth day of June, A. D. 1876, made and entered of record in said court a call and assessment upon the capital stock of said company and the stockholders thereof, for the purpose of raising money to pay the debts of said company, a necessity having arisen for such an assessment, and said court so adjudging, of seventy-six per cent. on each share of capital stock of said company, or seventy-six dollars on each share, less a credit of whatever had been before

44 that time paid on said stock by each of the stockholders or the assignor of any stockholder, and directed the same to be paid as hereinafter set forth, on, to wit, on or before the first day of August, A. D. 1876, at, to wit, the office of the Hon. Frederick A. Scoville, in the city of Fort Scott; which said call, assessment, and order was of the following tenor and effect:

In the district court of the United States, district of Kansas.

FRIDAY, *June* 10, *A. D.* 1876.

Present, the Hon. C. G. Foster, judge.

In the matter of the Fort Scott Coal and Mining Company, a bankrupt, on petition of its assignees, G. A. Scovill and T. H. Annable, *its assignees*, for an order and decree to assess the stockholders.

The said assignees having heretofore, viz, thirty-first day of March, A. D. 1876, filed their petition in said court, setting forth the condition of its assets, liabilities, and resources, with a statement of amount of unpaid stock, names and residence of stockholders, and a rule having been made by said court, on said filing of said petition, requiring the said stockholders to show cause why an assessment should not be made according to the prayer of said petition, which said rule was made returnable on the twenty-first day of April, A. D. 1876, and extended to this day, viz, the tenth day of June, 1876, by consent of stockholders and said assignees and the order of this court, the said cause came on for hearing, etc., on the exceptions and objections of stockholder R. S. Watson, appearing for himself and all others desiring to avail themselves of the said exceptions, the said R. S. Watson appearing by his attorneys, S. O. Thacher and James Grant, and the said assignees by their attorneys, McComas and McKeighan and C. W. Blair, the said exceptions and objections having been argued and submitted to the court, the court being fully advised, overruled the said exceptions and objections, to which ruling of the court the said stockholders duly excepted, whereupon an amendment, by leave of said court, was filed to said petition, whereupon said
45 cause came on for trial, on consideration of which, after argument of counsel, the court being now fully advised and informed concerning the same, it appearing that said rule has been served as directed, adjudges and decrees that the material allegations in said petition and amendment thereto are true; that the capital stock of said bankrupt has become and now is liable to assessment by this court for the full amount unpaid thereon, for the purpose of paying all claims properly provable in bankruptcy against said bankrupt corporation and the expenses of collecting such assessment and of the bankrupt proceedings; and that it is now necessary to make an assessment of seventy-six dollars on each share of stock to pay the said debts and expenses, in the manner prayed for by said assignees. Whereupon, on motion of C. W. Blair and McComas and McKeighan, attorneys of said assignees, it is by the court further ordered, adjudged, and decreed that for the aforesaid purposes a call and assessment be, and the same are hereby, made upon the capital stock and stockholders of the Fort Scott Coal and Mining Company of Kansas, the bankrupt herein, of seventy-six per centum of the par value of said stock, being seventy-six dollars on each, every share thereof, upon which call and assessment shall be credited to each stockholder any amounts paid heretofore

by him or his assignors for or on said share; and each and every holder of stock in said company is required to pay the amount hereby assessed when called for, viz, seventy-six dollars on each share, less amount already paid, to the said G. A. Scovill and T. H. Annable, the assignees of said bankrupt, at the office of Frederic Scoville, a register in bankruptcy in said court, in the city of Fort Scott, Kansas, on or before the first day of August, A. D. 1876; and in default of such payment the assignees are directed to sue for and collect the same; and if the amount realized from the said assessments shall prove insufficient for the purpose, the said assignees will report the deficiency for further action thereon. It is further ordered that the said assignees make a call and assessment in accordance herewith, and file the same in this court within twenty days from date hereof, and that they cause a copy thereof and of this decree to be served on or mailed to each of said stockholders, directed to him at his usual place of residence, as shown by
46 the book and record of said bankrupt, or as may be known by the said assignees, on or before the twenty-first day of July, A. D. 1876, and such notice shall be sufficient, and the affidavit of said assignees, or one of them, shall be sufficient evidence of the facts therein stated in regard to the same.

(Signed) C. G. FOSTER, *Judge.*

And whereas afterwards, to wit, on the first day of July, A. D. 1876, at, to wit, the said city of Fort Scott, the said assignees did duly make a call and assessment upon the capital stock and stockholders of said company, the time therefor having been duly extended for that purpose by the said district court on the application of said assignees, of following tenor and effect, viz:

United States district court, Kansas.

In the matter of the Fort Scott Coal and Mining Company, a bankrupt.

*Assessment of stock.*

In pursuance of the order of the court made herein on the tenth day of June, 1876, and under and by virtue thereof, and of the authority vested in us as assignees in bankruptcy of the Fort Scott Coal and Mining Company of Kansas, a bankrupt,

We, as such assignees, do hereby make an assessment and call upon the capital stock and stockholders of said corporation, a bankrupt, to the amount of seventy-six per cent. of the par value of the stock held by each of such stockholders upon each share thereof, upon which call and assessment there shall be credited to each stockholder any amount that may have been paid upon any share of stock held by him.

This assessment is made for the purpose of raising money to pay the debts and liabilities incurred by said corporation and company in the course of its business, and the costs and expenses of the said bankruptcy and of the proceedings herein, and the collection of this
47 assessment, and the necessity authorizing and requiring such assessment is now declared to have arisen, and each of the stockholders of said company of said corporation is hereby ordered and required to pay the amount hereby assessed and called for from him, at the office of Frederick Scovill, in the city of Fort Scott, Kansas, one of

the registers in bankruptcy of said court, on or before the first day of August, A. D. 1876.

Fort Scott, Kansas, July 1, 1876.

G. A. SCOVILL.
T. H. ANNABLE.

And whereas one R. S. Watson, one of the stockholders of said bankrupt company, appeared for himself and the other stockholders at the hearing of said application and petition, and objected to said call and assessment, and afterwards the said R. S. Watson filed a petition in the circuit court of the United States for the district of Kansas, for the review of the said order of the said district court of the United States, which was argued before Hon. John F. Dillon, judge of said court, at chambers, on consideration of which the said Hon. John F. Dillon, at the city of Topeka, in said district, on, to wit, the twenty-ninth day of November, A. D. 1876, made an order affirming in all things said order of the said district court, with the modification that the said district court enter an order allowing to each stockholder of said bankrupt company who should pay the amount of said call and assessment on his stock in ninety days from the said twenty-ninth day of November, A. D. 1876, a credit on his or her proportion of the amount so as aforesaid assessed, as was included for the purpose of paying the cost of enforcing by suit the collection of said assessment, the amount to be credited to be ascertained by the said district court, to which court the matter, together with said order, was remanded; which said order of the said Hon. John F. Dillon was of the following tenor and effect:

In the circuit court of the United States, district of Kansas.

In the matter of the petition of R. S. Watson, for himself and others, to review the assessment of the unpaid stock of the Fort Scott
48 Coal and Mining Company of Kansas, a bankrupt, made by the United States district court of Kansas the tenth day of June, A. D. 1876, on the application of G. A. Scovill and T. H. Annable, assignees of said bankrupt.

Now at this day came the said petitioners, by Grant and Smith, their attorneys, and the said assignees by their attorneys, McComas and McKeighan and C. W. Blair, whereupon the said court rendered its decision on said petition of review heretofore submitted by consent of said parties in vacation to Hon. John F. Dillon, judge of said court, and directed the following order to be made, viz, that the said order and decree of assessment of stock sought to be reversed by said petition for review be, and the same is hereby, affirmed in all things, with this modification, that the said district court enter an order allowing each stockholder of said bankrupt company who shall pay the amount of said assessment on his stock without suit in ninety days from this twenty-ninth day of November, A. D. 1876, a credit on his or her proportion of the amount so assessed as was included in said assessment for the purpose of paying the costs of enforcing by suit the collection of said assessment, the amount to be so credited in conformity with this order, to be ascertained by the said district court; to which court the matter, together with this order, is hereby remanded.

(Signed) JOHN F. DILLON, *Judge.*

And whereas afterwards the said district court of Kansas, sitting in bankruptcy at, to wit, the city of Topeka, on, to wit, the fourth day of

December, A. D. 1876, on application of the said assignees to ascertain the amount to be credited according to said order of said circuit judge, determined and ascertained the amount to be credited to be ten per cent. of the amount so as aforesaid assessed against the capital stock of said bankrupt, and ordered that there be, and there was thereby, allowed a credit of said ten per cent. in favor of any stockholder who should within ninety days from the said twenty-ninth day of November, A. D. 1876, pay the amount so as aforesaid assessed against him, less said credit, and said assignees were directed within thirty days to send a copy of said order by mail to the address of each stock-
49 holder of said bankrupt, as shown by the books of said company; which said order was of the following tenor and effect, to wit:

In the district court of the United States, district of Kansas.

In the matter of the assessment on unpaid stock of the Fort Scott Coal and Mining Company, a bankrupt, at Topeka, in said district.

Present, Hon. C. G. Foster, judge of said court; J. C. Wilson, clerk; Charles Miller, marshal.

DECEMBER 4, A. D. 1876.

Now at this day came on for hearing the application of G. A. Scovill and T. H. Annable, assignees of the said bankrupt, appearing by McComas and McKeighan and C. W. Blair, their attorneys, and it being represented in said application and shown on the hearing thereof that R. S. Watson, one of said company's stockholders, appearing for himself and others to resist the assessment on the unpaid stock of said company, made on the tenth day of June, A. D. 1876, subsequent thereto, sought by petition in review directed to Hon. John F. Dillon, judge of the circuit court of the United States for Kansas, to reverse and set aside the said assessment, and it appearing and being shown that the said Hon. John F. Dillon, judge of said court at Topeka, in said district, on the twenty-ninth day of November, A. D. 1876, after hearing the same, affirmed said assessment in all things, with this modification, that this court enter an order allowing a credit on the said unpaid stock in favor of each stockholder who, in ninety days from the twenty-ninth day of November, A. D. 1876, should pay without suit the amount chargeable against him or her by virtue of said assessment, said credit to be equal to the amount included in said assessment for the cost and expenses of enforcing by suit said assessment, which amount was directed to be ascertained by this court. Now, then, it being represented and shown by said assignees that not more than ten per cent. of the said assessment was included for said purpose, and that a credit of such amount would be just, it is ordered and directed that there be, and there is hereby, allowed a credit of ten per cent. on the amount chargeable to each stockholder by virtue of said as-
50 sessment who shall in ninety days from the twenty-ninth day of November, A. D. 1876, pay the amount due on said assessment and call, less said credit, according to the terms thereof. The said assignees are directed to send, within thirty days, a copy of this order by mail to the address of said stockholders of said bankrupt, as shown by the books thereof, postage prepaid.

(Signed) C. G. FOSTER, *Judge.*

And whereas the said def't did not pay the amount, so as aforesaid assessed against him, within said ninety days, nor any part thereof,

The said assignees aver that notice, as required by said orders, has been served.

And whereas the said def't, by reason of the premises, is now indebted and bound thereon to the plaintiffs, as assignees as aforesaid, seventy-six per cent. of each share, so as aforesaid held by him, or seventy-six dollars on each share, less 22,500 dollars heretofore as aforesaid paid by def't upon said shares, to wit, for the sum of, to wit, eleven thousand seven hundred dollars.

And being so indebted and bound, the said def't afterwards, to wit, Feb. 27, A. D. 1877, at, to wit, the city of Fort Scott, having become bound as aforesaid to pay, undertook and promised the plaintiffs, as assignees aforesaid, to pay them the said last-named sum of money on request, which time has long since elapsed.

Yet the said def't, although often requested, has not paid the said sum of money, or any part thereof, but has wholly neglected and refused so to do.

Yet, though often requested, the said def't wholly neglects and refuses to pay either of said sums of money, or any part thereof, in the several counts in this declaration mentioned to the said plaintiffs, assignees as aforesaid, to the plaintiffs' damage as assignees as aforesaid, as they say, in the sum, to wit, of 11,700 dollars, and therefore they bring this suit.

By McCOMAS AND McKEIGHAN,
C. W. BLAIR AND A. A. RANNEY,
*Att'ys for Pl'ffs.*

51 On the fourteenth day of June, A. D. 1877, the defendant filed the following answer and declaration in set-off, namely:

*Defendant's answer.*

And now comes the defendant, and for answer to the plaintiffs' process says that he denies each and every allegation in the plaintiffs' writ and declaration, and in each and every count thereof, contained.

And defendant further says that the plaintiffs cannot maintain this action, for the reason that the cause thereof, if any there be, accrued for the said assignees more than two years before this suit was begun.

By his attorneys:

RUSSELL & PUTNAM.

*Declaration in set-off.*

And defendant says, the bankrupt corporation made certain promissory notes, copies of which are hereto annexed, marked "A," "B," "C," "D," and "E," payable to its own order and endorsed by
52 it, and at the time of the filing of the petition upon which said corporation was adjudicated bankrupt, the defendant was, and still is, the holder of said notes, and no part thereof has been paid, and the said bankrupt corporation owes defendant the amount of said notes, with interest, and the defendant claims the right to set off his said notes and interest against any claim the plaintiffs may have against him in this suit.

By his attorneys:

RUSSELL & PUTNAM.

A.

$5,000.] FORT SCOTT, KANSAS, *May* 15, 1873.

For value received, the Fort Scott Coal and Mining Company promises to pay to its order five thousand dollars, in four equal payments, namely, one-quarter in eight months, one-quarter in twelve months, one-quarter in sixteen months, one-quarter in twenty months from date, with interest at the rate of twelve (12) per cent. per
53 annum, payable semi-annually.

Principal and interest payable at the office of J. E. Thayer & Bro., Boston, Mass.

THE FORT SCOTT COAL & MINING COMPANY,
No. 16. (Signed) C. O. GODFREY, *Treasurer.*

(Endorsement:) The Ft. Scott Coal and Mining Co., by (signed) C. O. Godfrey, treas.

B.

$2,000.] FORT SCOTT, KANSAS, *May* 15, 1873.

For value received, the Fort Scott Coal and Mining Company promises to pay to its own order two thousand dollars, in four equal payments, namely, one-quarter in eight months, one-quarter in twelve months, one-quarter in sixteen months, one-quarter in twenty months from date, with interest at the rate of twelve (12) per cent. per annum, payable semi-annually.

Principal and interest payable at the office of J. E. Thayer & Bro., Boston, Mass.

THE FORT SCOTT COAL & MINING CO.,
No. 17. (Signed) By C. O. GODFREY, *Treasurer.*

54 (Endorsements:) The Ft. Scott Coal and Mining Co., by (signed) C. O. Godfrey, treas.

C.

$2,000.] FORT SCOTT, KANSAS, *May* 15, 1873.

For value received, the Fort Scott Coal and Mining Company promises to pay to its own order two thousand dollars, in four equal payments, namely, one-quarter in eight months, one-quarter in twelve months, one-quarter in sixteen months, one-quarter in twenty months from date, with interest at the rate of twelve (12) per cent. per annum, payable semi-annually.

Principal and interest payable at the office of J. E. Thayer & Bro., Boston, Mass.

THE FORT SCOTT COAL & MINING CO.,
No. 18. (Signed) By C. O. GODFREY, *Treasurer.*

(Endorsement:) The Ft. Scott Coal and Mining Co., by (signed) C. O. Godfrey, treas.

55 D.

$1,000.] FORT SCOTT, KANSAS, *May* 15, 1873.

For value received, the Fort Scott Coal and Mining Company promises to pay to its own order one thousand dollars, in four equal pay-

ments, namely, one-quarter in eight months, one-quarter in twelve months, one-quarter in sixteen months, one-quarter in twenty months from date, with interest at the rate of twelve (12) per cent. per annum, payable semi-annually.

Principal and interest payable at the office of J. E. Thayer & Bro., Boston, Mass.

THE FORT SCOTT COAL & MINING CO.,
No. 19. (Signed) By C. O. GODFREY, *Treasurer*.

(Endorsement:) The Ft. Scott Coal and Mining Co., by (signed) C. O. Godfrey, treas.

E.

$300.] FORT SCOTT, KANSAS, *May* 15, 1873.

56 For value received, the Fort Scott Coal and Mining Company promises to pay to its own order three hundred dollars, in four equal payments, namely, one-quarter in eight months, one-quarter in twelve months, one-quarter in sixteen months, one-quarter in twenty months from date, with interest at the rate of twelve per cent. per annum, payable semi-annually.

Principal and interest payable at the office of J. E. Thayer & Bro., Boston, Mass.

THE FORT SCOTT COAL & MINING CO.,
No. 20. (Signed) By C. O. GODFREY, *Treasurer*.

(Endorsement:) The Ft. Scott Coal and Mining Co., by (signed) C. O. Godfrey, treas.

On the ninth day of July, A. D. 1877, the plaintiffs filed the following answer to defendant's declaration in set-off, namely:

*Plaintiffs' answer to defendant's declaration in set-off.*

57 The plaintiffs deny each and every allegation, item, and particular in the defendant's declaration in set-off contained, including each count thereof, the same as if each was specified and denied separately and in its order.

They say further that said notes were without consideration, unauthorized, & illegal and void, if ever given by the company as alleged.

They say further that said claims in set-off are not the subject of a set-off or allowable as such, if ever due in this action.

Further that the same were and have been proved and allowed against the estate of the corporation in bankruptcy and in question in the United States district court, sitting in bankruptcy in the district of Kansas.

And they make same answer to all counts in set-off.

By their att'ys:

A. A. RANNEY.
C. W. BLAIR.
McCOMAS & McKEIGHAN.

58 This cause was thence continued to the October term of this court, A. D. 1877, when on the tenth day of May, A. D. 1878, the following agreed statement of facts and exhibits thereto annexed are filed, namely:

59 *Agreed statement of facts and exhibits.*

In the circuit court of the United States for the district of Massachusetts.

T. H. Annable and G. A. Scoville, assignees of the Fort Scott Coal and Mining Company, a bankrupt, vs. Sidney Bartlett.
The same vs. Nathaniel Thayer.
The same vs. John M. Forbes.
The same vs. Henry J. Bigelow.
The same vs. Lemuel Shaw and Edward W. Hooper, executors of Samuel Hooper, deceased.
The same vs. J. W. Brooks.
The same vs. John N. Dennison.
The same vs. John A. Burnham.
The same vs. James H. Blake.
The same vs. Alpheus Hardy.
The same vs. George Putnam.
The same vs. Francis E. Parker and Oscar Iasigi, executors of Joseph Iasigi, deceased.
The same vs. George Warren.
The same vs. William G. Weld.
The same vs. William F. Weld.
The same vs. Robert S. Watson.
The same vs. T. Jefferson Coolidge.
The same vs. Esther E. Beebe and E. Pierson Beebe, executors of James M. Beebe, deceased.
The same vs. James H. Beal.
The same vs. J. N. A. Griswold.

60 Each of the said cases is now pending and undetermined in the said court.

It is hereby stipulated and mutually agreed, by and between the respective parties to the said suits, that the following statement of facts is true as to each of said suits, so far as the same is applicable thereto.

The case against Nathaniel Thayer is submitted to the court upon the following

STATEMENT OF FACTS.

The said Fort Scott Coal and Mining Company was duly and legally incorporated under the laws of the State of Kansas on the 25th day of November, 1870, with a capital stock of one hundred thousand ($100,000) dollars, divided into shares of one hundred ($100) dollars each.

On the 19th day of April, 1871, the said stock was increased from one to two hundred thousand dollars.

The said company was adjudged a bankrupt by the district court of the United States for the district of Kansas, and such proceedings have been had in said court as appear in the certified copies of the records and files of said court and deed of assignment hereto annexed, and made part of this agreement.

The said company kept a journal, ledger, transfer-book, certificate-book, and stock-ledger.

According to said books it appears that two additional issues of stock were made by the said corporation, one of one hundred thousand dollars, October 16, 1872; one of a like amount December 27, 1872; but

defendants deny that the corporation did or could, in fact, issue any such additional stock; and claim that said additional issues were ultra vires of the corporation, and absolutely null and void.

It is agreed that according to said books the several defendants appear to have held stock as follows: The stock described as of the first two issues being admitted to be valid, and that described as of the last two issues being denied by the defendants to be of any validity in all cases:

61 Sidney Bartlett held and owned, at the date of the said adjudication, and still holds and owns, shares of the stock of the said company as follows:

Certificate No. 64, for sixty-five shares, upon which he had paid to said company thirty dollars per share.

Also certificate No. 29, for eighty-five other shares, on which he had paid to the said company forty dollars per share; all of the first two issues.

Nathaniel Thayer held and owned at the said date of the said adjudication, and still holds and owns, shares of the stock of the said company as follows:

Of the first two issues, certificate No. 104, for two hundred and eighty-five shares. On two hundred of these shares he had paid to the said company thirty dollars per share; on the remaining eighty-five shares he had paid to the said company forty dollars per share.

Of the third and fourth issues, certificate No. 85, for one hundred and thirty-five other shares of said stock, upon which he had paid to the said company fifty dollars per share.

Also certificate No. 110, for four hundred and fifty other shares of the said stock, upon which he had paid to the said company fifty dollars share.

John M. Forbes held and owned at the date of the said adjudication, and still holds and owns, certificates of shares of the capital stock of the said company as follows:

Of the first two issues, certificate No. 26, for one hundred shares of the said stock, upon which he had paid to the said company forty dollars per share.

Of the third issue, certificate No. 87, for fifty other shares of said stock, upon which he had paid to the said company fifty dollars per share.

Henry J. Bigelow held and owned at the date of the said adjudication, and still holds and owns, shares of the stock of said company as follows:

Certificate No. 46, for one hundred shares, upon which there was paid to the said company forty dollars per share.

This stock was issued to George H. Cronyn, trustee, Sept. 12, 1870, and by him transferred to Henry J. Bigelow, Nov. 5, 1870. George H. Cronyn was trustee for the company. The defendant Bigelow bought the stock of C. O. Godfrey without actual knowledge or notice that it was not full paid or that it belonged to the company.

At the time Bigelow bought said stock, the books of said company showed that said Cronyn held it as trustee, but did not show for whom. When said stock was bought by said Bigelow, the forty dollars per share paid by him was turned over to the company by Cronyn, and said Bigelow was credited with the said forty dollars per share, and with the sixty dollars remaining unpaid by discount; but said Bigelow did not have actual knowledge of said entries.

The stock was issued to said Cronyn for the purpose of being sold by

him for the company, but Bigelow had no actual knowledge of this fact. Bigelow did not see the Cronyn certificate. The transfer was made on the books by Cronyn, and the new certificate sent to Bigelow.

62 Also certificate No. 25, for one hundred other shares, upon which he had paid to the company forty dollars per share; all of the first two issues.

SAMUEL HOOPER.—The said Samuel Hooper, at the date of the said adjudication, held and owned, and his executors still hold and own, the shares of the capital stock of the said company as follows:

Of the first issue one hundred shares, upon which there was paid to said company forty dollars per share. This stock was issued to George H. Cronyn, trustee, Sept. 12 and Oct. 19, 1870, and by him transferred to Samuel Hooper, Nov. 5, 1870. George H. Cronyn was trustee for the company. Hooper bought the stock of C. O. Godfrey without actual knowledge that it was not full paid or that it was held in trust for the company. The books of the company showed that at the time of said purchase Cronyn held said stock as trustee, but did not show for whom he so held it. When said stock was bought by said Hooper, the said forty dollars per share was turned over to the company and he was credited with the said forty dollars per share and with the unpaid portion, by discount; but he did not see the books or know what entries were made in them.

Of the second issue, fifty shares, on which he had paid the said company forty dollars per share.

Of the third issue, certificate No. 91, for seventy-five other shares, on which he had paid to the said company fifty dollars per share.

The said Samuel Hooper died February 14, 1875, and the said Lemuel Shaw and Edward W. Hooper were duly and legally appointed his executors by the probate court of Suffolk County, Massachusetts, March 15, 1875. They duly filed their bond as executors, and it was duly approved on the last named day; and they gave notice of their appointment, according to law, and affidavit thereof was duly filed in the probate office May 14, 1875.

T. Jefferson Coolidge, at the date of the said adjudication, held and owned one hundred shares of the stock of the said company of the first, and fifty of the second issue, the par value of which amounted in the aggregate to the sum of fifteen thousand dollars, upon the shares of which stock there was paid to the said company the sum of six thousand dollars, and purported to own of the third and fourth issues one hundred and fifty-five shares, upon which was paid to the company seven thousand seven hundred and fifty dollars by said Coolidge.

Ninety of the said shares of the first issue were issued originally to George H. Cronyn, trustee, Sept. 12, 1870, and were transferred to said Coolidge, Nov. 5, 1870. Ten of said shares of the first issue were issued to C. O. Godfrey, Sept. 12, 1870, and by him transferred to said Coolidge, Nov. 5, 1870.

The books of the company showed that Cronyn was trustee, but did not show for whom, and also showed that only forty dollars per share had been paid by said Godfrey on said ten shares.

Cronyn transferred the ninety shares on the books of the company, and Coolidge was credited with said forty dollars per share, and with sixty dollars per share by discount; but said Coolidge did not have acknowledge that these entries were made.

The fifty shares of the second issue were issued directly to said Cool-

idge, and he paid forty dollars on each share; he was credited with said forty dollars per share, and by discount with sixty dollars per share.

James M. Beebe, at the date of said adjudication, held and owned, and his executors own, seventy-five shares of the third issue of stock of said company, upon which he had paid fifty dollars per share.

Since said date the said James M. Beebe has departed this
63 life, and Esther E. Beebe and E. Pierson Beebe are his duly qualified executors.

James H. Beal, at the date of the said adjudication, held and owned, and still holds and owns, shares of capital stock of the said company, as follows:

Of the first and second issues, certificate No. 50, for one hundred on shares, which there was paid to the said company forty dollars per share.

Of this stock seventy-five shares was originally issued by the company to C. O. Godfrey, Sept. 12, 1870, and by him transferred to said Beal, Nov. 5, 1870. Twenty-five shares were originally issued by said company to Cronyn, trustee, by him transferred to A. L. Hopkins, and by him transferred to said Beal, Nov. 5, 1870.

Said Beal bought said stock of and through said Godfrey, supposing it to be stock already issued by the corporation, and without actual knowledge or notice that the same was not full paid or that the corporation had any claim in respect thereof. The books of the company showed that the stock had not been paid up, but that there remained unpaid sixty dollars per share; but said Beal never saw said books or had actual knowledge of the entries therein.

Of the third and fourth issues, certificates No. 90, for seventy-five other shares, upon which he had paid the said company fifty dollars per share.

Certificate No. 114, for eighty other shares, upon which he had paid to the said company fifty dollars per share.

Of the first and second issues, certificate No. 32, for fifty other shares of the said stock, upon which he had paid forty dollars per share.

J. W. Brooks, at the date of the said adjudication, owned and held, and still owns, shares of the capital stock of the said company as follows:

Of the first and second issues, certificate No. 99, for one hundred shares, upon which he had paid to the said company forty dollars per share.

Of the third issue, certificate No. 112, for fifty other shares, upon which he had paid to the said company fifty dollars per share.

JOHN N. DENNISON.—The said John N. Dennison, at the date of said adjudication, held and owned, and still holds and owns, of the said stock the following shares:

Of the first and second issues, certificate No. 27, for one hundred shares, upon which he had paid to the said company forty dollars per share.

John A. Burnham, at the date of the said adjudication, owned and held, and still owns and holds, shares of the said capital stock of the said company as follows:

64 Of the first and second issues, certificate No. 24, for one hundred shares, on which he had paid the said company forty dollars per share.

Of the third and fourth issues, certificate No. 86, for fifty other shares of the said stock, upon which he had paid the company fifty dollars per share.

Also certificate No. 111, for fifty other shares of the said stock, upon which he had paid the said company fifty dollars per share.

James H. Blake, at the date of the said adjudication, held and owned, and still holds and owns, shares of the said stock as follows:

Of the first and second issues, certificate No. 105, for twenty shares of the said stock, upon which there was paid to the said company forty dollars per share.

Ten shares of this stock were originally issued to George H. Cronyn, Sept. 12, and by him transferred to E. T. Hornblower, Nov. 5, 1870. The remaining ten shares were originally issued to C. O. Godfrey; by him transferred to E. T. Hornblower, April 30, 1871.

E. T. Hornblower transferred the whole of said twenty shares of stock to said Blake, Feb. 27, 1872. Mr. Blake purchased the stock of Hornblower without actual knowledge or notice that it was not full paid, or that Hornblower was not the real owner of the stock. The books of the company showed that the stock had not been paid except in the manner stated, by part payment in money and the balance by discount; but said Blake never saw the books, or had actual knowledge of the entries therein.

Of the third and fourth issues, certificate No. 102, for fifteen other shares of said stock, upon which he had paid to said company fifty dollars per share.

Also certificate No. 116, for fifty other shares of the said stock, on which he had paid the said company fifty dollars per share.

Alpheus Hardy, at the date of the said adjudication, held and owned, and still holds and owns, of the shares of the said stock as follows:

Of the first and second issues, certificate No. 66, for eighty shares of the said stock, upon which there was paid to the said company fifty dollars per share.

This stock was originally issued partly to C. O. Godfrey and partly to persons who transferred to him, and was by him transferred to defendant Jan. 31, 1872. Defendant bought the stock of Godfrey without actual knowledge or notice that it was not full paid or that the company had any claim in respect thereof.

Of the third and fourth issues, certificate No. 117, for forty other shares, upon which he had paid fifty dollars per share.

George Putnam, at the date of the said adjudication, held and owned, and still doth hold and own, shares of the said stock as follows:

Of the first and second issues, certificate No. 106, for one hundred shares of the said stock, upon which there was paid forty dollars per share.

Of this stock twenty shares was originally issued to George H. Cronyn, trustee, Sept. 12, 1870, by him transferred to L. Carper, Oct. 10, 1870, and Sept. 13, 1872, was transferred by the administrator of said Carper, then deceased, to defendant.

Eighty shares were originally issued in September, 1870, and April, 1871, to various parties whose titles came by sundry transfers, to C. O. Godfrey, who transferred them to said Putnam, Jan. 31, 1872.

Said Putnam purchased all of said stock of or through said Godfrey, with no actual knowledge or notice that the stock was not paid in full or that the corporation had any claim in respect of it. The books of the company showed that said stock was not full paid, except by forty per cent. in cash and the balance by discount; but said Putnam never saw said books or had actual knowledge of the entries therein.

65 Of the third and fourth issues, certificate No. 96, for fifty other shares, upon which he had paid fifty dollars per share.

Also certificate No. 118, for fifty other shares of the stock, upon which he had paid the said company fifty dollars per share.

Joseph Iasigi, at the date of the said adjudication, owned shares of e capital stock of the said company, as follows:

Certificate No. 122, for one hundred and fifty shares of the said stock, upon which he had paid to the said company fifty dollars per share, all of the third and fourth issues. That since that time the said Joseph Iasigi has departed this life, and the said Francis E. Parker and Oscar Iasigi have been appointed his executors.

G. Warren, at the date of the said adjudication, owned, and still owns, shares of the capital stock of the said company as follows:

Certificate No. 120, for one hundred and fifty shares of said stock, upon which he had paid to the said company fifty dollars per share, all of the third and fourth issues.

Robert S. Watson, at the date of the said adjudication, owned and held, and still owns and holds, shares of the capital stock of the said company as follows:

Certificate No. 123, for fifty shares of the said stock, upon which there was paid to the said company fifty dollars per share, all of the third and fourth issues.

This stock was issued by the company to E. T. Hornblower, Dec. 4, 1872, and transferred by him to the defendant, Jan. 22, 1873.

The books of the company showed that the stock was not paid for in full; but said Watson never saw said books, or had actual knowledge of the entries therein.

J. N. A. Griswold, at the date of the said adjudication, owned and held, and still holds and owns, shares of the capital stock of the said company as follows:

Certificate No. 124, for fifty-five shares of said stock, upon which he had paid to the said company fifty dollars per share, all of the third and fourth issues.

" William F. Weld, at the date of the said adjudication, owned and held, and still owns and holds, shares of the stock of the said company as follows:

Certificate No. 93, for seventy-five shares of the said stock, upon which he had paid to the company fifty dollars per share.

Also certificate No. 115, for seventy other shares of the said stock, upon which he had paid to the said company fifty dollars per share, all of the third and fourth issues.

William G. Weld, at the date of the said adjudication, held and owned, and still holds and owns, shares of the capital stock of the said company as follows:

Certificate No. 65, for one hundred and fifty shares of the capital stock of said company, upon which there had been paid thirty dollars per share, all of the first and second issues.

Of this stock, one hundred and thirty-five shares were originally issued by the company to Sidney Bartlett, Sept. 12, 1870, and April 30, 1871, and by him transferred to William F. Weld, Oct. 24, 1871. Fifteen shares were originally issued to C. O. Godfrey, April 30, 1871, and by him transferred to William F. Weld, Aug. 31, 1871. The whole was transferred by William F. Weld to the defendant in November, 1871 (transfer 21). The defendant had no actual knowledge or notice that anything was unpaid on the stock. But the books of the company showed that Sidney Bartlett, the original holder of one hundred and thirty-five shares, had only paid thirty dollars per share, and that there had only been paid fifty dollars per share on the other fifteen

shares; but said Weld had no actual knowledge of the contents of the books.

It is agreed that the notes set up by certain of said defendants in their several declarations of set-off filed in said cases were notes given to them by the said bankrupt prior to said date of adjudication, and were subsisting claims against the said bankrupt at said date; that, after the said adjudication, each of the said defendants owning said notes filed and proved the same in said bankrupt court, as is required by law, and the same were allowed as claims against the said bankrupt's estate.

The certificates of stock of each of said defendants herein mentioned were made in accordance with the printed blank certificate hereto attached, marked J.

No other or further payment was ever made to said company upon the stock held by the said defendants than the payments hereinbefore mentioned; but defendants contend that they are entitled to have their payments on account of the void stock of the third and fourth issues credited to them as paid towards their dues to the corporation, if any, on account of the first and second issues.

The general statutes of 1868, of Kansas, and of 1872, with reference to corporations, may be referred to.

67 The stockholders' and directors' proceedings with reference to increase of stock from two hundred thousand dollars to three hundred thousand dollars, and from three hundred thousand dollars to four hundred thousand dollars, are correctly set forth in copies of same certified to by the secretary of state (marked C and D). Said certificates are dated respectively the 24th day of October, A. D. 1872, and the 6th day of January, A. D. 1873.

Certain proxies of certain of the defendants, authorizing certain persons therein named to vote at certain stockholders' meetings therein named, are annexed (marked H).

Formal demand was made on each of said defendants by the assignees before suit was brought.

The said assignees made an assessment and call in pursuance of the order and decree of the 10th of June, A. D. 1876, of the district court of the United States for the district of Kansas, and the order extending the time, as shown by papers hereto annexed, marked F, and they mailed copies thereof, and of said order and decree, as directed in the same, and sent copies of the order of said court of December 4th, A. D. 1876, as directed; said copies are hereto annexed.

No assessments or calls were ever made by the said corporation upon the stockholders or stock of said company after the payments hereinbefore set forth.

Certain receipts given to certain of the defendants for payments on account of stock, and surrendered to the company on receipt of the stock, are annexed (marked I).

It is agreed that after the two last increases of stock herein set forth, the said company continued business until about February, A. D. 1874, and incurred debts and liabilities which have not been paid, and which have been proved and allowed in said bankrupt court.

It is admitted, as hereinbefore stated, that the signatures of certain of the defendants, or the deceased persons represented by them, to certain proxies, of which copies are annexed hereto, authorizing certain persons therein named or their substitutes to vote for them

68 at two different meetings of stockholders of said company, viz, the 15th of October, A. D. 1872, and the 24th day of December,

1872, are genuine, and that the signatures to powers by substitution, which are hereto annexed, of said persons so empowered appointing substitutes, are genuine.

That the call of the company for said meeting of October 15, 1872, was in the following words, and notice thereof was given by publication as hereinafter stated, viz:

"STOCKHOLDERS' MEETING.

"A meeting of the stockholders of the Fort Scott Coal and Mining Company will be held at the office of the company, in Fort Scott, Kansas, on Tuesday, October 15, 1872, between the hours of 9 o'clock a. m. and 4 o'clock p. m., for the purpose of acting upon the following proposition, submitted by the board of directors: 'Shall the capital stock of this company be increased to three hundred thousand dollars?'

"C. O. GODFREY,
"WM. PIERSON,
"EDWARD PRICE,
"J. W. JOHNSTON,
"JAMES RITCHIE,
"*Directors.*"

Which call was published for three consecutive weeks previous to said meeting in the Fort Scott Monitor, a daily newspaper of general circulation in the neighborhood of its publication, and published at Fort Scott, Kansas, and a copy of the same was sent by mail, three weeks previous to said meeting, to each stockholder of said company, at his usual post-office address.

That said meeting was attended by said persons so authorized to vote or their substitutes, and said meeting was adjourned to the 16th of October, 1872, when said persons or their substitutes, representing by said proxies a majority of the stockholders of said company, voted for said increase, which was afterwards made and certified to by the
69 directors, as shown in the proceedings of stockholders and directors heretofore referred to in this stipulation, as certified to by the secretary of state of Kansas, and marked C.

That the call of said company for said meeting of the 24th of December, A. D. 1872, was in the following words:

"STOCKHOLDERS' MEETING.

"By order of the board of directors, a meeting of the stockholders of the Fort Scott Coal and Mining Company is called to meet at the office of the company in Fort Scott, Kansas, between the hours of 10 a. m. and 4 p. m. on Tuesday, the 24th day of December, 1872, to vote upon the following proposition, to wit: 'Shall the capital stock of the Fort Scott Coal and Mining Company be increased to four hundred thousand dollars?' and for the further transaction of business.

"EDWARD PRICE,
"WM. PIERSON,
"J. W. JOHNSTON,
"*Directors.*"

Which call was published for three consecutive weeks previous to said meeting, in the Fort Scott Monitor, a daily newspaper of general circulation in the neighborhood of its publication, and published at Fort

Scott, Kansas, and a copy of the same was sent by mail, three weeks previous to said meeting, to each stockholder, at his usual post-office address.

That said meeting was attended by said persons or their substitutes so empowered to vote at said meeting, and said meeting was adjourned to the 27th of December, A. D. 1872, when said persons, or their substitutes representing by said proxies a majority of the stockholders of said company, voted for said increase from three hundred to four hundred thousand dollars, and said increase was made and certified to by the directors of said company, as set forth in the proceedings of the stockholders and directors heretofore mentioned in this agreement, and certified to by the secretary of the State of Kansas, as marked D.

That after the said several increases of stock, heretofore mentioned, the defendants, or those under whom they claim, received
70 certificates for the several amounts of the same herein stipulated to be held by them.

That after said several increases of stock, the managers of said company, at Fort Scott, kept an advertisement in said newspaper designating said company as having a capital stock of said several amounts, and printed said amounts as the capital stock of said company on its letter and bill heads; and said managers and the agents of said company, transacting its business in Kansas, represented to different persons and banks, who were solicited to, and did, give credit to said company, that its capital stock was four hundred thousand dollars, said persons, banks, and officers thereof, believing said statements.

That debts so created remain unpaid and have been proven in said bankrupt court.

On Nov. 13, 1873, a meeting of the directors of the Fort Scott Coal and Mining Company was held at Fort Scott. There were present, C. O. Godfrey, Edward Price, A. W. De Forest, John Hall. Absent, S. W. Phillips.

Resignations of S. W. Phillips and John Hall were received and accepted. J. W. Brooks and Sidney Bartlett were by the board elected to fill the vacancies occasioned by these resignations. The last two named were not present at the meeting.

At this meeting an entire new code of by-laws was submitted and passed, among which was sect. 12, which was and is in words and figures as follows:

SECT. 12. Assessments of the capital stock may he made by the board of directors, as the requirements of the company may demand. Written notice of such assessments, when made, shall be given to each stockholder, specifying the amount and time of payment thereof, such notice to be delivered to each stockholder, or sent by mail to his usual post-office address, ten days previous to day of payment; on non-payment of such assessment for thirty days after notice and demand of payment, as aforesaid, the board of directors may declare the stock of such defaulting stockholder forfeited to the use of the company, or take such other action in the premises as may be provided by law.

Said by-laws were directed to be placed on the record book of the company, and were so placed; but the record of said meeting and of said by-laws was attested on said record book by the signature of the president alone. Said by-laws were so passed, and placed on said book, long after said defendants purchased their stock.

Each and all of the transfers of stock set out in the original agreed statement, and in the amendments thereto, were made as required by

the laws of Kansas, on the books of the company, and the transferees were substituted on the books of the company as the holders of the stock.

It is also agreed that by agreement made at the date of the issue of the shares of stocks herein specified, the amounts paid thereon were credited to the purchasers thereof, and the balance unpaid credited by discount to said purchasers, and the certificates, as per copy attached, signed and delivered to said purchasers, and the stock account between the company and the said purchasers with reference to said shares of stock balanced by said discount.

It is understood that this agreement is not to be construed as yielding or conceding any proposition of law desired to be maintained by either side; the defendants and each of them insisting as matter of law that said increases last hereinbefore mentioned were and are absolutely void, and the plaintiffs claiming that such objection cannot, under the facts, be set up.

Every fact in the foregoing statement is admitted subject to all objections as to relevancy, competency, or materialty.

A. A. RANNEY,
McCOMAS & McKEIGHAN,
*For Plaintiffs.*
RUSSELL & PUTNAM,
*For Defendants.*

BOSTON, MASS., *Dec.*, 1877.

71 A.—*Articles of incorporation.*

The undersigned hereby mutually agree, by virtue of chapter 23 of the General Statutes of the State of Kansas, entitled "An act concerning private corporations," approved March 6th, 1862, to enter into and organize a body politic and corporate, for the term of fifty years, to be called the Fort Scott Coal and Mining Company, of Kansas, for the purpose of mining and digging for coal and other minerals in the places hereinafter named, and buying and selling and dealing in the same.

The capital stock of said company shall consist of one hundred thousand (100,000) dollars, to be divided into one thousand shares of one hundred dollars each.

The number of directors of said company shall be five, who shall manage the affairs of said company until the first Monday in July, 1871, and until their successors shall be duly elected and qualified.

The chief office and place of business of said company shall be kept at Fort Scott, in said State.

The mining operations of said company are to be conducted and carried on in the county of Bourbon, and such other counties in the State of Kansas and elsewhere as the directors of said company shall hereafter deem best calculated to promote the interests of the stockholders thereof.

We hereby nominate and appoint C. O. Godfrey, Edward Price, and G. H. Cronyn, all of Hannibal, Marion County, Missouri, and Ves. W. Kniffen and S. A. Williams, of Fort Scott, Kansas, to be directors of said company from the organization thereof until the first Monday in July, 1871, when an election for directors shall be held in pursuance of said act and the by-laws of said company.

Said directors shall have power to make and adopt such by-laws, rules, and regulations respecting the disposition of the stock, and the control and management of the operations and affairs of said company,

as they may deem expedient and proper, not inconsistent with the Constitution of the United States or the constitution or statutes of the State of Kansas.

72 They shall choose one of their number president, and they shall also appoint a secretary and treasurer, and such other officers and servants for carrying on the business of said company as shall be necessary, and they may remove and discharge the same from time to time, as the interests of the company may require.

They shall determine the duties of said officers, agents, and servants, and fix the salaries and wages to be paid them.

Witness our hands and seals this 10th day of June, 1870.

C. O. GODFREY. [SEAL.]
EDWARD PRICE. [SEAL.]
GEO. H. CRONYN. [SEAL.]
S. A. WILLIAMS. [SEAL.]
VES. W. KNIFFEN. [SEAL.]
WM. H. FISK. [SEAL.]

STATE OF MISSOURI,
*County of Marion, ss:*

Be it remembered that on this 11th day of June, 1870, before the undersigned, clerk of the Hannibal court of common pleas, a court of record at Hannibal, in said county of Marion, personally came C. O. Godfrey, Edward Price, and G. H. Cronyn, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as parties thereto, and acknowledged that they executed the same for the uses and purposes therein mentioned.

In testimony whereof I have hereto set my hand and affixed seal of said court, at my office in Hannibal, the day and year above written.

[SEAL.] JOHN V. HIBBEN, *Clerk.*

STATE OF KANSAS,
*County of Bourbon, ss:*

Be it remembered that on this 20th day of June, 1870, before the undersigned, a notary public in and for the county of Bourbon, State
73 of Kansas, came S. A. Williams and Ves. W. Kniffen, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument of writing as parties thereto, and acknowledged that they executed the same for the uses and purposes therein mentioned.

In testimony whereof I have hereto set my hand and affixed my official seal at my office in Fort Scott, Kansas, the day and year above written.

[SEAL.] DARWIN R. MASON,
*Notary Public.*

STATE OF KANSAS,
*County of Shawnee, ss:*

On this 25th day of November, A. D. 1870, personally appeared before me, H. C. Williams, a notary public in and for said county, Wm. H. Fisk, personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as one of the parties thereto, and acknowledged the execution of the same for the uses and purposes therein mentioned.

Witness my hand and notarial seal the day and year last above written.

[SEAL.] H. C. WILLIAMS,
*Notary Public, Shawnee Co., Kan.*

Filed June 20, 1870, and duly recorded in Book A, of corporations, on page 4.

WILEY ANDERSON, *Register.*

I, Thomas Moonlight, secretary of state, State of Kansas, do hereby certify that the foregoing is a true and correct copy of the original instrument filed in my office November 25, 1870.

In testimony whereof I have hereunto subscribed my name and caused to be affixed the great seal of State.

Done at Topeka, this 25th day of November, A. D. 1870.

[SEAL.] THOMAS MOONLIGHT,
*Secretary of State.*

74 B.—*First increase of stock.*

At a meeting of the board of directors of the Fort Scott Coal and Mining Company of Kansas, held at Fort Scott, Kansas, on the 19th day of April, A. D. 1871, there were present the following directors, viz: Edward Price, Ves. W. Kniffin, and W. R. Johnson.

Absent, C. O. Godfrey and Geo. H. Cronyn.

On motion of Mr. Johnson, the following resolutions were adopted, viz:

Whereas the proposition submitted to the stockholders of this company at a meeting thereof, held at the office of the company at Fort Scott, Kansas, on the 19th day of April, A. D. 1871, was adopted by stockholders in number representing a majority of all the shares in this company; and

Whereas the board of directors of this company was instructed by said meeting to carry into effect the action of said meeting: therefore,

Resolved, That the capital stock of this company be, and the same is hereby declared, increased to two hundred thousand dollars.

Resolved, That the president of this company be and is hereby instructed to have a copy of these resolutions signed by the directors, and also signed by the president, and countersigned by the secretary of this company, with the seal of the company affixed thereto, filed in the office of the secretary of the State of Kansas and have said resolutions duly recorded in the office of the secretary of state as aforesaid. The president of this company be and is hereby instructed to procure a duly certified copy of these resolutions and certificate under the great seal of the State of Kansas, and file the same among the records of this company.

On motion the meeting adjourned.

EDWARD PRICE, *President.*

WM. R. JOHNSON, *Secretary pro tem.*

75 The undersigned, the directors, president, and secretary of the Fort Scott Coal and Mining Company of Kansas, do hereby certify that the foregoing, from pages twenty to twenty-one inclusive, contain a true, full, and complete copy of the resolutions of the board of directors of said company, increasing the capital stock of said company as therein stated.

In testimony whereof we have hereunto subscribed our names and caused the seal of said company to be hereunto affixed this 19th day of April, A. D. 1871.

Attest:

[SEAL.] GEO. H. CRONYN, *Secretary.*

EDWARD PRICE, *Pres.*
V. W. KNIFFEN,
WM. R. JOHNSON,
C. O. GODFREY,
GEO. H. CRONYN,
*Directors.*

I, W. H. Smallwood, secretary of state of the State of Kansas, do hereby certify that the foregoing is a true and correct copy of the original instrument of writing filed in my office April 27th, A. D. 1871.

In testimony whereof I have hereunto subscribed my name and caused to be affixed the great seal of the State.

Done at Topeka this 28th day of April, A. D. 1871.

[SEAL.] W. H. SMALLWOOD,
*Secretary of State.*

C.—*Second increase of stock.*

Be it known to all whom it may concern:

That at a meeting of the board of directors of the Fort Scott Coal and Mining Company, of Kansas, held at the office of the company, in Hannibal, State of Missouri, on the 19th day of October, A. D. 1872, the following among other proceedings were had, to wit:

Upon motion of C. O. Godfrey, the following resolutions were introduced, considered, and unanimously adopted, to wit:

76 Whereas a meeting of the stockholders of the Fort Scott Coal and Mining Company, of Kansas, was held at its office in Fort Scott, Kansas, on the 15th and 16th days of October, A. D. 1872, called by due notice, to consider and vote upon the following proposition, to wit: "Shall the capital stock of this company be increased to three hundred thousand dollars?"

Whereas said proposition was adopted by more than two-thirds of the stockholders of the company, and the board of directors was directed to carry the same into effect:

Now, therefore, be it resolved—

First. That the capital stock of this company be increased to, and the same is hereby declared to be, three hundred thousand dollars.

Second. That the date and amount of said increase of said capital stock be certified to the secretary of the State of Kansas by the directors, as provided by law.

Be it further known, that by the said action of the board of directors of said company the capital stock of the Fort Scott Coal and Mining Company aforesaid was increased from two hundred thousand to three hundred thousand dollars at their said meeting on the said 19th day of October, A. D. 1872, and that the undersigned are all legally qualified and acting members of the board of directors of said company, and constitute said board.

In testimony and certification of which, each of the said members of said board hereunto sets his hand and affixes his seal this 19th day of

October, A. D. 1872, the same being further attested by the seal of said company.

EDWARD PRICE, [SEAL.]
C. O. GODFREY, [SEAL.]
[SEAL.] JAS. RITCHIE, [SEAL.]
J. W. JOHNSON, [SEAL.]
*Directors.*

I, W. H. Smallwood, secretary of state of the State of Kansas, do hereby certify that the above and foregoing is a true and correct
77 copy of the original instrument of writing, filed in my office October 24, A. D. 1872.

In testimony whereof I have hereunto subscribed my name and affixed the great seal of the State.

Done at Topeka this 24th day of October, A. D. 1872.

[SEAL.] W. H. SMALLWOOD,
*Secretary of State.*

Filed at 10 o'clock a. m.

D.—*Third increase of stock.*

Be it known to all whom it may concern:

That at a meeting of the board of directors of the Fort Scott Coal and Mining Company, of Kansas, held at the office of the company in Hannibal, State of Missouri, on the thirtieth day of December, A. D. 1872, the following, among other proceedings, were had, to wit:

Upon motion of C. O. Godfrey, esq., the following resolution was introduced, considered, and unanimously adopted:

Whereas a meeting of the stockholders of the Fort Scott Coal and Mining Company was held at its office in Fort Scott, Kansas, on the 27th day of December, A. D. 1872, called by due notice, to consider and vote upon the following proposition, to wit: Shall the capital stock of the Fort Scott Coal and Mining Company be increased to four hundred thousand dollars? And whereas, at said meeting, the said proposition was adopted by a majority of the stock of the company, and the board of directors was directed to carry the same into effect, in accordance to law:

Now, therefore, be it resolved—

First. That the capital stock of the Fort Scott Coal and Mining Company be increased to, and the same is hereby declared to be, four hundred thousand dollars, divided into shares of one hundred dollars each.

Second. That the date and amount of said increase of said
78 capital stock be certified to the secretary of state of Kansas by the directors, as required by law.

Be it further known, that, by the said action of the board of directors of the said company, the capital stock of the Fort Scott Coal and Mining Company aforesaid was increased from three hundred thousand dollars to four hundred thousand dollars at their said meeting on the said 30th day of December, A. D. 1872, and that the undersigned are all legally acting members of said board of directors of said company, and constitute said board.

In testimony and certificate of which each of the said members of said board hereunto sets his hand and seal this 30th day of December,

A. D. 1872, the same being further attested by the seal of said company.

[SEAL OF COMPANY.]

EDWARD PRICE. [SEAL.]
C. O. GODFREY. [SEAL.]
WILLIAM PIERSON. [SEAL.]
J. W. JOHNSON. [SEAL.]

STATE OF MISSOURI,
*County of Marion, ss:*

Be it remembered that on this 1st day of January, A. D. 1873, before the undersigned, a notary public within and for the county of Marion and State of Missouri, personally came C. O. Godfrey, Edward Price, and William Pierson, who are personally known to me to be the same persons whose names are subscribed to the foregoing and annexed instrument of writing as parties thereto, and acknowledged the same to be their act and deed for the purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my official seal, at my office in Hannibal, Mo., the day and year first above written.

[SEAL.] ASA TURNER,
*Notary Public.*

79 STATE OF MISSOURI,
*County of Jackson, ss:*

Be it remembered that on this 3d day of January, A. D. 1873, before the undersigned, a notary public within and for the county of Jackson and State of Missouri, personally came J. W. Johnson, who is personally know to me to be the same person whose name is signed to the foregoing instrument as a party thereto, and acknowledged the same to be his act and deed for the purpose therein mentioned.

Witness my signature and official seal.

Done at my office in Kansas City, day and year first above written.

[SEAL.] EDWARD H. ALLEN,
*Notary Public.*

I, W. H. Smallwood, secretary of state of the State of Kansas, do hereby certify that the above and foregoing is a true and correct copy of the original instrument of writing filed in my office January 4, A. D. 1873.

In testimony whereof I have hereunto subscribed my name and affixed the great seal of the State.

Done at Topeka this 6th day of January, A. D. 1873.

[SEAL.] W. H. SMALLWOOD,
*Secretary of State.*

E.—*Proceedings in bankruptcy.*

UNITED STATES OF AMERICA,
*District of Kansas, ss:*

In the district court of the United States for the district of Kansas.

In the matter of the Fort Scott Coal and Mining Company, a bankrupt.

Be it remembered that on the second day of April, A. D. 1874, there

was filed in said court the following petition, and deposition thereto, in said case, and order made thereon, which were and are in words and figures as follows:

80 In the district court of the United States for the district of Kansas.

To the Hon. C. G. Foster, judge of the district court of the United States for the district of Kansas:

The petition of C. W. Goodlander, H. S. Currie, and B. E. Langdon, partners as Goodlander, Currie & Co., of the city of Fort Scott, of the county of Bourbon, in the State of Kansas, respectfully shows that they are creditors of the Fort Scott Coal and Mining Company, a corporation duly organized under the laws of the State of Kansas, who, for a period of twelve months next preceding the date of the filing of this petition, have been doing business in the city of Fort Scott, Kansas, and within said district.

That your petitioners' demand is provable against the said Fort Scott Coal and Mining Company, in accordance with the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, A. D. 1867.

That your petitioners believe that the said Fort Scott Coal and Mining Company owns debts to an amount exceeding the sum of three hundred dollars, that your petitioners' demands exceed the amount of two hundred and fifty dollars, and that the nature of your petitioners' demand against the said Fort Scott Coal and Mining Company is as follows:

In an account for wares and merchandise, consisting of flour and meal, the same being more fully set forth in an exhibit hereto attached, marked Exhibit A, and made part of this petition.

Your petitioners further represent that within the six calendar months next preceding the date of this petition, the said Fort Scott Coal and Mining Company did commit an act of bankruptcy, within the meaning of said act, and that the said Fort Scott Coal and Mining Company did heretofore, to wit, on March 1st, 1874, within the period aforesaid, and within the district of Kansas, then and there fraudulently suspend payment of their commercial paper for a period of more than fourteen days, and that they have not resumed payment of the same.

81 That your petitioners further show that on the second day of April, A. D. 1874, the said Fort Scott Coal and Mining Company, being utterly insolvent, wholly suspended business, and refused to pay and any all claims against them, or to give any satisfaction or security for the same.

That on the said second day of April, 1874, one John Hull, the superintendent of said company at Fort Scott, within said district, told your petitioners that they were insolvent, and had wholly suspended business, and that they were unable to do anything for their creditors.

Wherefore your petitioners pray that the said Fort Scott Coal and Mining Company be declared bankrupts, and that a warrant may be issued forthwith to take possession of their estates, that the same may be distributed according to law, and that such further proceedings may be had thereon as the law in such cases prescribes.

(Signed) GOODLANDER, CURRIE & CO.

UNITED STATES OF AMERICA,
*District of Kansas, ss:*

I, H. S. Currie, one of the firm of Goodlander, Currie & Company, the petitioners herein, do hereby make solemn oath that the statements contained in the foregoing petition subscribed by me are true so far as the same are stated of my own knowledge, and that those matters which are therein stated on information and belief are true according to the best of my knowledge and information and belief.

H. S. CURRIE.

Subscribed and sworn to before me this 2d day of April, A. D. 1874.

CYRUS O. FRENCH,
*Register in Bankruptcy.*

Let an order issue to show cause on the foregoing petition, returnable at the office of Cyrus O. French, register in bankruptcy at Fort Scott, Kansas, on the 10th day of April, A. D. 1874, at 10 o'clock, a. m. Also let an order issue for injunction restraining the debtor from transferring, disposing of, or otherwise in any manner interfering with property not exempted from the operation of the bankrupt act. Copy of petition to be served with order to show cause.

82

C. G. FOSTER, *Judge.*

*Exhibit A, No. 1.—Goodlander mill and elevator.*

FORT SCOTT, KANSAS, *April* 2, 1874.

Fort Scott Coal and Mining Co. bought of Goodlander, Currie & Co.:

| | | | | | |
|---|---|---|---|---|---|
| Feb. | 2. | 14½ bush. | meal | 70c. | $10 15 |
| | 4. | 15 " | " | | 10 50 |
| | | 4,000 " | flour | 4c. | 160 00 |
| | 10. | 30 " | meal | | 21 00 |
| | | 4,000 " | flour | | 160 00 |
| | | 25 " | meal | | 20 00 |
| | | 15 " | " | 80c. | 12 00 |
| | 20. | 15 " | " | | 12 00 |
| | 26. | 30 " | " | | 24 00 |
| | 27. | 2,000 " | flour | 4c. | 80 00 |
| | | 25 " | meal | 80c. | 20 00 |
| | | | | | $529 65 |
| Amount brought forward from No. 1 | | | | | $529 65 |
| March | 6. | 1,650 bush. | bran | | $13 75 |
| | | 500 " | feed | | 6 25 |
| | 7. | 2,500 " | flour | | 100 00 |
| | 9. | 400 " | feed | | 5 00 |
| | 11. | 45 " | meal | | 36 00 |
| | | 400 " | bran | | 3 54 |
| | 21. | Order to Kulp | | | 8 00 |
| | | | | | $702 19 |
| Cr. | By 1,637$\frac{70}{80}$ bush. coal, at 10c., for March | | | | 153 77 |
| | | | | | $538 42 |

83 (Upon the back of which petition are the following endorsements, to wit:) 395. In the matter of Fort Scott Coal and Mining Company, bankrupts. Petition of creditors, filed April 2, 1874, 4 p. m. J. C. Wilson, clerk. W. E. Guerin, attorney for petitioners.

DISTRICT OF KANSAS, *ss:*

Received this petition April 4, 1874, and served the same by giving to John Hull, the superintendent of the Fort Scott Coal and Mining Company, April 4, 1872, a true copy of this petition, with all the endorsements thereon; the president and general manager of said corporation being absent from, and not residing within, this district.

W. S. TOUGH,
*United States Marshal,*
By C. H. HALLERT, *Deputy.*

Service, $2.00; travel 1 mile, 10c.; copy, 50c=$2.60.

In the district court of the United States for the district of Kansas.

In the matter of the Fort Scott Coal and Mining Company, bankrupts, against whom a petition for adjudication of bankruptcy was filed on the 2d day of April, 1874, before C. O. French, one of the registers of this court in bankruptcy.

DISTRICT OF KANSAS, *ss:*

H. S. Currie, being duly sworn and examined, upon his oath says that the Fort Scott Coal and Mining Company, on the 18th day of March, 1874, did commit an act of bankruptcy, they then and there having suspended payment of their commercial paper for a period of more than fourteen days, they being, at the said time, merchants and traders in the business of buying and selling coal. That on the 2d day of April, 1874, this affiant presented an account against said company at their office, and was, by their agent, notified that said company
84 had suspended business, and were utterly insolvent, and expected that the company would be thrown into bankruptcy.

(Signed) H. S. CURRIE.

On the 2d day of April, 1874, personally appeared H. S. Currie, the above-named witness, and was duly sworn to the truth of the foregoing statement.

CYRUS O. FRENCH,
*Register in Bankruptcy for the District of Kansas.*

(Endorsed:) 395. In the matter of the Fort Scott Coal and Mining Company. In bankruptcy. Filed April 2d, 1874. C. O. French, register.

Afterwards, to wit, on the 4th day of April, 1874, there was filed in said court, sitting as a court of bankruptcy, the following order to show cause, with the return thereon, which was, and is, in words and figures, as follows:

In the district court of the United States for the district of Kansas.

In the matter of the Fort Scott Coal and Mining Company, against whom a petition for adjudication of bankruptcy was filed on the 2d day of April, 1874. In bankruptcy.

AT FORT SCOTT, KANSAS, *April* 4, 1874.

DISTRICT OF KANSAS, *ss:*

By virtue of the special order of reference to me directed, it is ordered that the said Fort Scott Coal and Mining Company appear before me as a court of bankruptcy, to be holden at my office, in the city of Fort Scott, district of Kansas, State of Kansas, and county of Bourbon, on the 10th day of April, 1874, at ten of the clock in the forenoon, and show cause, if any there be, why the prayer of said petition accompanying this order should not be granted; and it is further ordered
85 that a copy of said petition, together with a copy of this order, be served on said Fort Scott Coal and Mining Company, by delivering the same to the proper representative of said company, or by leaving the same at their last usual place of residence in said district, at least five days previous to the day required for its appearance. It is further ordered that the said Fort Scott Coal and Mining Company be, and they hereby are, restrained from selling or disposing of any of its effects or property.

Witness, the Hon. C. G. Foster, judge of said court.

CYRUS O. FRENCH,
*Register in Bankruptcy.*

(Endorsed:) 395. In the matter of the Fort Scott Coal and Mining Company. In bankruptcy. Order to show cause and restraining order. Filed April 4, 1874. C. O. French, register.

Received this order April 4, 1874. Served April 4th, at 3.15 p. m., 1874, at Bourbon County, Kansas, by delivering to John Hull, the superintendent of said company at Fort Scott, Kansas; the president and general manager of said company being absent from this, and not residing in this district. A true copy of the within order, with all the endorsements thereon.

W. S. TOUGH,
*U. S. Marshal,*
By C. A. HALLERT,
*Deputy.*

Service, $2.00; travel, one mile, 10c.; copy, 50c=$2.60.

Afterwards, to wit, on the 11th day of April, 1874, there was filed in said court, sitting as a court of bankruptcy, an order of adjudication in said case, which was, and is, in words and figures following, to wit:

In the district court of the United States for the district of Kansas.

In the matter of the Fort Scott Coal and Mining Company, against whom a petition for adjudication in bankruptcy was filed on the 2d day of April, A. D. 1874.

At Atchison, in said district, on the 11th day of April, 1874, before Hon. C. G. Foster, judge of the district court of the United States for the district of Kansas.

86 This day the above cause coming on to be heard on the report

of C. O. French, esq., one of the registers of this court, and said report being confirmed, it is ordered, therefore, that the said Fort Scott Coal and Mining Company, a corporation organized and under and by virtue of the laws of the State of Kansas, be, and are hereby adjudged, bankrupts within the true meaning and intent of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, before the filing of the said petition, and they are therefore declared and adjudged bankrupts accordingly.

It is further ordered that the said bankrupts shall, within ten days after the date of this order, make and deliver or transmit by mail, post-paid, to the marshal, as messenger, a schedule of their creditors and an inventory of their estates, in the form of, and verified in the manner required, of the petitioning debtor by the said act.

It is further ordered, that for further proceedings, said cause is hereby referred to Hon. C. O. French, one of the registers in bankruptcy of said court, in accordance with the provisions of said act.

In testimony whereof I have hereunto set my hand this 11th day of April, A. D. 1874.

C. G. FOSTER,
*U. S. Dist. Judge.*

(Endorsed on the back as follows, to wit:) No. 395. In the matter of the Fort Scott Coal and Mining Company, bankrupts. Order of adjudication and reference. Filed April 11th, 1874. C. O. French, register.

Afterwards, to wit, on the 2d day of May, 1874, there was filed in said court, sitting as a court of bankruptcy, a memorandum of first meeting of creditors in said case, and acceptance of assignees, and approval, which was and is in words and figures as follows:

87 In the district court of the United States for the district of Kansas.

In the matter of the Fort Scott Coal and Mining Company, bankrupts, in bankruptcy.

At Fort Scott, in the county of Bourbon, and State of Kansas, on the 29th day of April, 1874, before C. O. French, register in bankruptcy.

DISTRICT OF KANSAS, *ss:*

MEMORANDUM.—This being the day appointed by the court for the first meeting of creditors under said bankruptcy, whereof the notice required in that behalf has been duly given, I, the undersigned, register of said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take proof of the debts, and for the choice of assignees under the said bankruptcy. And I do hereby certify that the greater part in number and in value of the creditors who have proved their debts were present, or duly represented, and made choice of Gustavus A. Scoville and Thomas H. Annable, both of Fort Scott, Bourbon County, as the assignees of the said bankrupt's estate. The vote for these assignees was unanimous, and comprised a majority in number and in value of all creditors whose claims have been proved in said matter.

And I do approve said election.

CYRUS O. FRENCH,
*Register in Bankruptcy.*

(On the back of which are the following endorsements, to wit:) 395. Fort Scott Coal and Mining Company, bankrupts. Memorandum. First meeting. Filed May 2, 1874. J. C. Wilson, clerk.

88 In the district court of the United States for the district of Kansas.

In the matter of the Fort Scott Coal and Mining Company, bankrupts, in bankruptcy.

We, Gustavus A. Scoville and Thomas H. Annable, do hereby accept the trust as assignees of the estate of said bankrupts, as elected by the creditors on the 29th day of April, 1874.

THOMAS H. ANNABLE.
GUSTAVUS A. SCOVILLE.

I, Cyrus O. French, register in bankruptcy for said district, do hereby approve of and confirm the said choice of assignees.

CYRUS O. FRENCH,
*Register in Bankruptcy.*

DISTRICT OF KANSAS, *ss:*

I do hereby approve the choice of assignees herein, and they will give bonds in the sum of twenty-five thousand dollars.

C. G. FOSTER, *Judge.*

(Endorsed on the back as follows, to wit:) 395. In the matter of the Fort Scott Coal and Mining Company, in bankruptcy. Acceptance of assignees. Filed May 2, 1874. J. C. Wilson, clerk.

Afterwards, to wit, on the days respectively endorsed thereon, there was filed in said court the petition of the assignees of said company for an assessment against the stock of said company, amendment to said petition, rule to show cause, and decree and order of the said court with respect thereto, which were and are in words and figures as follows:

89 F.—*Assessment of stock.*

In the district court of the United States, sitting in and for the district of Kansas.

In the matter of the Fort Scott Coal and Mining Company, in bankruptcy.

And now come G. A. Scovill and T. H. Annable, the assignees of said bankrupt, by C. W. Blair and McComas and McKeighan, their attorneys, and file their petition, setting forth the necessity for making a call and assessment of fifty-six dollars per share on each share of the capital stock of said bankrupt, for the purpose of obtaining means to pay off in full the debts and liabilities of said bankrupt, and the said petition having been *been* duly read and considered by the court, the court doth hereby order that all stockholders in said bankrupt company show cause, if any they have, on the 21st day of April, A. D. 1876, at two o'clock p. m., at the court-house in the city of Topeka, in said district, why the assessment and call prayed for in said petition should not be made.

And it is further ordered that the said assignees cause a copy of this order to be mailed without delay to each stockholder, at his usual place of residence and address, as shown by the book or records of said company, and also by publication in the Fort Scott Daily Monitor, published at Fort Scott, Kansas, daily for at least ten days before the said 21st day of April, A. D. 1876. In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at my office in Topeka, this 31st day of March, A. D. 1876.

[L. S.] C. G. FOSTER, *Judge.*

Attest:

J. C. WILSON, *Clerk.*

Endorsed on the back thereof are the following endorsments, to wit:

395. In the matter of the assessment of stock in the United States
90 district court for the district of Kansas of the Fort Scott Coal and Mining Company. Rule against stockholders to show cause. Filed April 5, 1876, 3 p. m. J. C. Wilson, clerk.

UNITED STATES OF AMERICA,
*District of Kansas, ss:*

In the district court of the United States, sitting within and for said district.

In the matter of the Fort Scott Coal and Mining Company of Kansas, a bankrupt

To the honorable C. G. Foster, judge of said court:

Your petitioners, G. A. Scovill and T. H. Annable, the assignees in bankruptcy of the estate and effects of the above-named bankrupt, respectfully represent as follows:

That the said bankrupt was a corporation duly organized, incorporated, and existing under and by virtue of an act of the legislature of the State of Kansas, entitled "An act concerning private corporations," approved March 6th, 1862, and acts amendatory thereto. The said corporation was organized about June 10th, 1870, and began its business operations very soon afterwards, and continued them until about the 13th day of February, 1874, when it became so financially embarrassed that it was compelled to suspend its business, being unable to meet its commercial paper or other liabilities as they become due; and on or about the 11th day of April, A. D. 1874, was duly adjudged a bankrupt upon the petition of Goodlander, Currie & Co., one of its creditors, by the said district court of Kansas.

Your petitioners were elected, at a meeting called under the bankrupt act on the 29th day of April, A. D. 1874, the assignees of the estate and the effects of the said bankrupt, which trust they accepted, and afterwards, to wit, on the 4th day of May, A. D. 1874, the estate and effects of said bankrupt were duly assigned to them under the act of Congress with reference thereto; and your petitioners are now the duly elected, acting and qualified assignees of the said bankrupt. The purposes and objects of the said corporation were to mine and
91 dig coal and other minerals, and to buy and sell the same in the county of Bourbon, Kansas, and such other counties in said State and elsewhere as the directors of the company might deem necessary.

At the date of the filing of the petition in bankruptcy and said adjudication, the capital stock was four hundred thousand dollars, all of which was at said dates subscribed for, taken, and held. The said stock was divided into shares of one hundred dollars each, and said shares were held and owned almost entirely by the original stockholders, who had from time to time elected the said bankrupt's officers, voted for and increased its capital stock, and who held and owned said stock as stock in a corporation held and published to the world as having a capital stock of four hundred thousand dollars, and upon the faith of which it was enabled to and did create large liabilities, to enable it to carry on its business on a grand scale, almost amounting to and intended to be a monoply in Kansas of its particular pursuit. Many of the liabilities so created will never be paid unless said stockholders are compelled to make good its capital stock.

Your petitioners hereto attach to this petition Exhibit A, and pray it may be made and considered a part hereof, showing who the said stockholders are, the amount of stock held by each, how acquired, etc. The said stockholders, and each of them, held and owned, and do hold and own, certificates of stock for their shares of stock in said corporation, which in all cases were and are as follows, and were executed by affixing the seal of the company, and by the signatures of the president and secretary:

Incorporated under the laws of Kansas.

*The Fort Scott Coal and Mining Company of Kansas.*

SHARES.

This is to certify that is entitled to shares in the capital stock of the Fort Scott Coal and Mining Company of Kansas, transferable only on the books of the company, in person or by attorney, on the surrender of this certificate.

Witness the seal of the company and the signatures of the president and secretary of Fort Scott Coal and Mining Company of Kansas, this day of , 187 .

*President.*
*Secretary.*

92 The by-laws of the said company provided that assessments of capital stock might be made by the board of directors as the requirements of the company might demand, specifying length of notice, etc. No assessments were, however, made.

Your petitioners represent that while said stockholders at said dates held said certificates of stock, amounting in the aggregate to four hundred thousand dollars, they, nor either of them, had not, nor have they, paid into said company or its assignees more than forty or fifty per centum of one hundred dollars for each share; some of said stockholders, or the original holders, having paid fifty per centum, and others forty; and there was and is due from said stockholders, and they are legally and equitably liable to pay, the remainder unpaid by them on said stock for the benefit of the creditors of said bankrupt, who are here represented by your petitioners; as your petitioners are informed and believe, all of said facts were and are well known to said stockholders and each of them.

Your petitioners attach hereto Exhibit B, and pray that it might be

made and considered a part of this petition, showing amount of stock held by each one, and what amount was paid by each holder or original stockholder.

Your petitioners claim, that by the charter of said company, its by-laws, the law of Kansas, and the general principles of law governing stockholders of corporations, that each and all of said stockholders have a liability resting upon them to pay your petitioners, for the benefit of the creditors of said company, such part of the amount unpaid by them on said stock as may be necessary to pay off such portion of the debts and liabilities of said company as cannot be discharged and paid off by the available assets of the said company.

Your petitioners represent that at said date of adjudication in bankruptcy, the affairs of said company were in a very embarrassed and complicated condition, and much time has been necessarily consumed, and considerable expense incurred, in opposing claims attempted to be established in said bankrupt court, for failures on part of said
93 company to comply with contracts made by it. Many fraudulent claims for large amounts have been filed against said bankrupt, requiring time to oppose and defeat, which have been defeated. The litigated claims are now reduced to a small number, not covering more than ten thousand six hundred and one dollars and eighty cents. The property of the company on hand at the date of adjudication in bankruptcy has been disposed of as rapidly as seemed conducive to the interests of all concerned. The sale of a portion of the real estate has been delayed in the hope that the demand for land would increase, and your petitioners realize something out of it for the benefit of the creditors.

Your petitioners believe, however, that any further delay in the disposal of the bankrupt's property would not be advantageous.

Your petitioners had intended, before making this application, to have fully closed up the contests over litigated claims, disposed of the assets of the company, and collected all its bills receivable; but find it is impossible to accomplish it without a longer postponement than is convenient or expedient.

Your petitioners are informed and believe that in other cases similar to this one the bankrupt courts have made assessments on the capital stock on an approximate showing of the bankrupt's financial condition which can now be done by your petitioners with reasonable certainty.

The creditors of the company are restless over the long and, to them, seemingly unnecessary delay. The said stockholders, as your petitioners are informed and believe, live at or near the city of Boston, State of Massachusetts; the city of New York, State of New York; and the city of Hannibal, State of Missouri. All of these are men of wealth and responsibility, so far as your petitioners are informed; and, as your petitioners are informed and believe, intend to oppose all efforts made to enforce the liability claimed by your petitioners. Such opposition will render necessary suits in the States of Massachusetts, New York, and Missouri to recover any assessments made by this court, which litigation might be prolonged for some time.

If the stockholders should defeat your petitioners' suit on the ground of non-liability, your petitioners are informed and believe
94 that each of them, under the constitution and laws of the State of Kansas, are liable to an amount equal to their stock to pay the debts and liabilities of said bankrupt after all its assets have been exhausted.

Your honor can see the importance of instituting proceedings at once. The entire assets of the company will not, when reduced to cash, exceed $13,692.66. The debts and liabilities, including those that have not been passed upon, are about $105,682.45, leaving a balance of $91,889.79 to be paid, together with the costs of your petitioners administering or settling the affairs of said bankrupt, which may be a considerable amount, in case these proceedings should be contested, and as well the suits against each individual stockholder to recover the assessments. The said costs, expenses, attorney's fees, your petitioners estimate at $32,695 (although much less may be required), making a total of $124,684.79 to be assessed against said stockholders. As said stockholders have paid different amounts on their stock, viz, some 50 per centum, some 40 per centum, while others have paid even less than that, your petitioners believe that the simplest mode would be to make the assessment on the basis of 56 per centum on the amount unpaid by each stockholder. The amount of the liabilities of the bankrupt over and above the assets is $124,684.79, while the amount yet due and unpaid on the stock held and owned by the said stockholders is $222,650, the former amount being 56 per centum of the latter.

The present financial condition of the company in bankruptcy, and your petitioners' estimate of the amount necessary to be assessed to pay the debts and liabilities of the said company, and the probable cost and expenses of settlement, is hereunto attached, marked Exhibit C, and prayed to be made and considered as a part of this petition. Your petitioners therefore, in consideration of the premises, pray that they may be directed and ordered to make a call and assessment of fifty-six per centum of the amount unpaid by, and yet due from, each stockholder, on the shares of the capital stock of the bankrupt, now held and owned by them respectively, as shown by Exhibits A and B, attached hereto and made a part hereof; and that the court will
95 order and direct the details of such call and service of notice thereof on said stockholders, and that your petitioners be at liberty to make application to the court for a further and additional call, should it be required.

CHARLES W. BLAIR AND
McCOMAS & McKEIGHAN,
*Attorneys for Assignees.*

FORT SCOTT, KANSAS, *March* 31, 1876.

UNITED STATES OF AMERICA,
*District of Kansas, ss :*

In the district court of the United States for said district.

T. H. Annable, of lawful age, being by me first duly sworn, deposes and says that he is one of the foregoing petitioners; that the foregoing petition was read to him, and he knows the contents thereof, and that the same is true of his own knowledge except as to matters stated on information and belief, and as to those he believes them to be true.

T. H. ANNABLE.

Subscribed and sworn to before me this 31st day of March, 1876.
[SEAL.] W. C. PERRY,
*Notary Public, Bourbon County, Kansas.*

UNITED STATES OF AMERICA,
*District of Kansas, ss :*

G. A. Scovill, being first duly sworn, deposes and says that he is one of the foregoing petitioners; that the foregoing petition has been

read to him and he knows the contents thereof, and that the same is true of his own knowledge except as to matters stated on information and belief, and as to those he believes them to be true.

G. A. SCOVILL.

Subscribed and sworn to before me this 31st day of March, 1876.

C. G. FOSTER, *Judge.*

96 (Endorsed:) No. 395. In the United States district court for the district of Kansas. In the matter of the assessment of stock of the Fort Scott Coal and Mining Company, a bankrupt. Petition of assignees. Filed March 31st, 1876, at 2 p. m. J. C. Wilson, clerk. 30 fo. Blair, McComas & McKeighan, attorneys for assignees.

EXHIBIT "A."

SIDNEY BARTLETT.—Certificate No. 29, 85 shares, $8,500; issued April 28th, 1871. This was accounted for on journal A, page 78, by 40 per cent., paid $3,400, and 60 per cent. charged to discount account, $5,100. First increase of stock, $100,000; certificate No. 1 issued and surrendered, and original certificate No. 6, $20,000; 200 shares, issued September 26th, 1871. This was accounted for on journal at 30 per cent., $6,000; 70 per cent. charged to discount account, $14,000; certificate exchanged for No. 41, May 9th, 1871. No. 41 surrendered, and certificate 63 issued to Wm. F. Weld, transfer No. 18, October 24th, 1871; 135 shares, $13,500. Also new certificate issued, No. 64, to S. Bartlett, $6,500; proportion paid at 30 per cent., $1,950; balance due at 70 per cent., $4,550. Original journal entry, page 18. Balance due and unpaid, $9,650.

NATHANIEL THAYER.—Certificate of original stock, No. 7, was issued September 26th, 1870, for 200 shares, $20,000. This was accounted for on journal A, folio 18, by 30 per cent. paid. This was paid by his note, at 6 months, $6,000; balance due was charged to discount account at 70 per cent., $14,000. This original certificate, No. 7, was afterwards surrendered May 9th, 1871, and certificate No. 42 issued in lieu of it for 200 shares. Certificate No. 21, of the first increase of stock from $100,000 to $200,000, was issued April 28th, 1871, for 85 shares, $8,500. This was paid for at 40 cents on the dollar, as shown on journal A, folio 78, $3,400; $5,100 balance of 60 per cent. charged to discount account. Certificates No. 21 and 42 were surrendered, and a new certificate issued November 4th, 1872, in lieu of them, being No. 104, for 285 shares, which is now in name of Thayer on books. Certificate No.
97 85 was issued October, 1872, 135 shares, $13,500; payment of 50 per cent. shown on journal B, folio 2 and 44, $6,750; balance charged to discount account, $6,750, same folio. Certificate No. 110, issued January 8, 1873, for 450 shares, $45,000, payment of 50 per cent. shown on folio 2 of journal, $22,500, and balance charged to discount account, $22,500. Total unpaid and due, $48,350.

J. M. FORBES.—Certificate of stock, second issue, No. 26, 100 shares, $10,000; amount paid, 40 per cent., $4,000; amount unpaid charged to discount account, $6,000. Certificate of stock, 87, third increase of stock, 50 shares, $5,000; amount paid, 50 per cent., $2,500; amount charged to discount account, $2,500; amount due and unpaid, $8,500.

H. J. BIGELOW.—Certificate No. 14, issued October 19, 1870, for 100 shares, $10,000. This was a transfer from G. H. Conyer, trustee, No. 5, of stock held in trust for company; 40 per cent. paid, as shown, folio 23, $4,000; amount charged to discount, $6,000. This certificate was

surrendered, and new certificate No. 46 issued May 9th, 1871, and now held. Certificate No. 25, issued April 28th, 1871, 100 shares, $10,000, paid on this 40 per cent. by C. O. Godfrey, sight draft, $4,000; 60 per cent. charged to discount account, $6,000, journal, 78, and due and unpaid, $12,000.

SAMUEL HOOPER.—Stock certificate 15, for 100 shares, $10,000, issued October 19th, 1870, being transferred from stock held by G. H. Conyer, trustee for company. Transfer certificate No. 6, paid for at 40 per cent., as shown, journal, folio 23, $4,000, charged to discount account, 60 per cent., $6,000. Certificate No. 15 surrendered, and certificate No. 47 issued in place of it. Stock certificate 33, issued April 28th, 1871, 50 shares, $5,000, paid on this 40 per cent. by ten days' draft, $2,000—$3,000, shown on journal, 78 and 79, now held. Certificates Nos. 47 and 33 surrendered, and No. 100 issued October 28th, 1872, in lieu of them. Certificate No. 91, issued October, receipt acknowledged October 25th, 1872, 75 shares, $7,500; paid for 50 per cent., $3,750,
98 $3,750, amount unpaid, charged to discount account, journal B, folio 2. Unpaid and due, $12,750.

JOHN KELL, *Boston, Mass.*—Certificate No. 16, being transfer of certificate No. 7 of original stock, issued Oct. 19th, 1870, to Jefferson T. Coolidge, 100 shares, $10,000; paid on this 40 per cent., to E. T. Hornblower and C. O. Godfrey, agents of the company, $4,000; balance of 60 per cent. charged to discount account, $6,000. This certificate No. 16 was surrendered, and new certificate No. 48 issued to Jefferson Coolidge. Certificate No. 31, issued April 28th, 1871, 50 shares, $5,000; paid for at 40 per cent. by C. O. Godfrey, draft 10 days on Coolidge, $2,000; $3,000 balance, 60 per cent., charged to discount account. Certificate No. 103, issued October 30th, 1872, in place of certificates Nos. 48 and 31. Certificate 97, issued to J. T. Coolidge, October 25th, 1872, for 75 shares, $7,500; paid 50 per cent., $3,750; balance unpaid, charged to discount account, $3,750, journal, folio 2. Certificate No. 113, issued January 8th, 1873, to J. T. Coolidge, acknowledged January 22, 1873, 80 shares, $8,000; paid 50 per cent., $4,000; unpaid, charged to discount account, $4,000, journal 2. Certificate 140, issued for 305 shares, to John Kell, February 10th, 1874, being in exchange for certificates to Coolidge, No. 97 for 75 shares, No. 103 for 150 shares, and No. 113 for 80 shares; transfer certificate No. 47, February 10th, 1874. Total unpaid on John Kell stock, $16,750.

JAMES M. BEEBE, *Boston, Mass.*—Certificate No. 92, issued October 1872, receipt acknowledged; 75 shares, $7,500; amount paid, 50 per cent., $3,750; $3,750 amount unpaid. Amount due on stock, $3,750.

J. H. BEAL.—Certificate No. 19, issued October 19th, 1870, 100 shares, $10,000, journal, page 213; paid Godfrey and Hornblower for company at 40 per cent., $4,000; unpaid and charged to discount, $6,000. Certificate 19 surrendered, and 50 issued in place, May 9th, 1871. Certificate No. 90, issued October, receipt acknowledged October 25th, 1872, 75 shares, $7,500, and paid 50 per cent., $3,750; $3,750 unpaid
99 and charged to discount account, journal B, page 2. Certificate No. 32, issued April 28th, 1871, 50 shares, $5,000; amount paid 40 per cent., by draft 2,383, 10 days, $2,000, 60 per cent., charged to discount account, $3,000, journal, pages 78 and 79. Certificate No. 114, issued January 8th, 1873, 80 shares, $8,000; amount paid 50 per cent., $4,000; amount charged to discount, $4,000; journal B, 2. $16,750 due and unpaid.

J. W. BROOKS.—Certificate No. 28, issued April 28th, 1871, 100 shares, $10,000; 40 per cent., $4,000; amount charged to discount ac-

count, $6,000; receipt acknowledged May 2d, 1871; paid for by draft of 60 days. Certificate No. 28 returned, and certificate No. 99 issued in lieu of it, and now held; date of issue, October 28th, 1872; receipt acknowledged. Certificate No. 89, issued for 50 shares; not accepted, and returned. Certificate No. 112, issued January 8th, 1873, for 50 shares, $5,000; paid on stock 50 per cent., $2,500; amount charged to discount account, $2,500; receipt acknowledged January 22d, 1873. Due and unpaid, $8,500.

J. N. DENNISON, *Boston, Mass.*—Certificate No. 27, issued April 28th, 1871, receipt on file; 100 shares, $10,000; amount paid 40 per cent., $4,000; amount unpaid, 60 per cent., $6,000, charged to discount account.

J. A. BURNHAM, *Boston, Mass.*—Certificate No. 24, issued April 28th, 1871, acknowledged and on file May 4th, 1871, 100 shares, $10,000; amount paid, folio 78, $4,000; amount unpaid and charged to discount account, $6,000. Certificate No. 86, issued October, 1872, receipt acknowledged October, 1872, 50 shares, $5,000; amount paid, old journal, 238, new, 2, $2,500; unpaid 50 per cent., charged to discount account, $2,500. Certificate No. 111, issued January 8th, 1873, acknowledged January 22d, 1873, 50 shares, $5,000; paid 50 per cent., folio 238—2, $5,000; amount charged to discount account, $2,500. Amount unpaid and now due, $11,000.

JAMES H. BLAKE.—Certificate No. 13, issued to E. T. Horn-
100 blower, Oct. 18th, 1870, transfer 4, Geo. H. Conyer, trustee, 10 shares, $1,000; 40 per cent. paid, $400; 60 per cent. charged to discount account, $600. Certificate No. 35, for 10 shares, was issued April 20, 1871, by transfer; C. O. Godfrey to E. T. Hornblower, 10 shares, $1,000; 40 per cent. paid; 60 per cent charged to discount account, $600. (See page 79, Journal A). Certificates 35 and 45 given up, and certificate No. 67 issued in lieu, in favor of James H. Blake. Certificate 67 surrendered, and 105 issued in lieu. Certificate No. 102 issued October 28, 1872; 15 shares, $1,500; 50 per cent. paid, $750; 50 per cent. charged to discount account, $750. Certificate No. 116, issued January 8, 1873; 50 shares, $5,000; 50 per cent. paid, $2,500—$2,500, 50 per cent. charged to discount account; $4,450 due and unpaid.

ALPHEUS HARDY.—Certificate No. 66 was issued January 16, 1872; by transfer No. 25, from C. O. Godfrey; 80 shares, $8,000; paid on this 50 per cent, $4,000; amount charged to discount account, $4,000. Certificate No. 117 was issued January 8, 1873; 40 shares, $4,000; 50 per cent. paid, $2,000; 50 per cent. charged to discount account, $2,000; amount unpaid and due, $6,000.

GEORGE PUTNAM.—Certificate No. 9 was issued October 10th, 1870, for 20 shares to L. Carper, by transfer No. 3, G. H. Conyer, trustee; certificate No. 9 given up, and certificate No. 70 issued in lieu to Geo. Putnam. Transfer No. 26, by C. O. Godfrey, February 8th, 1872, to Geo. Putnam, 80 shares, and certificate 68, issued February 8th, 1872. Certificates 68 and 70 given up, and certificate No. 106, 100 shares, $10,000; 40 per cent. paid on this $4,000; unpaid and charged to discount account, $6,000. Certificate No. 96, issued for 50 shares, receipt acknowledged October 29th, 1872, $5,000; 50 per cent. paid, $2,500; 50 per cent. charged to discount account, $2,500. (See folio 2, Journal B.) Certificate No. 118, issued January 8th, 1873, for 50 shares, $5,000; 50 per cent. paid; amount unpaid and charged to discount account, $2,500. Amount due and unpaid, $11,000.

J. IASIGI.—Certificate No. 122, issued January 22d, 1873, 150
101 shares, $15,000; paid on stock 50 per cent., $7,500; charged to

discount account, $7,500; (page 2 Journal B;) amount due and unpaid, $7,500.

GEO. W. WARREN & Co.—Certificate No. 120 was issued January 8th, 1873, receipt acknowledged January 22d, 1873, 150 shares, $15,000; paid 50 per cent., $7,500; amount charged to discount account, $7,500; (folio 3 Journal B;) amount due and unpaid, $7,500.

R. S. WATSON.—Certificate No. 107, issued to E. T. Hornblower, December 4th, 1872, assigned by No. 38 to R. S. Watson, and stock certificate given up. Certificate No. 123, for 50 shares, issued January 22d, 1873, $5,000; receipt acknowledged; amount paid, 50 per cent., $2,500; amount unpaid and due, $2,500.

J. N. A. GRISWOLD.—Transfer certificate No. 42, of 55 shares, from the company stock certificate No. 124, issued for 55 shares, $5,500; paid on this 50 per cent., $2,750; amount charged to discount account, $2,750, which is unpaid and due.

A. W. DE FOREST.—Certificate No. 134, one share, $100, issued July 14th, 1873; unpaid and charged to discount account, $50.

WILLIAM G. WELD.—Certificate No. 6, issued for 200 shares, original stock given up, and 41 given in lieu. Certificate No. 41 given up, and 62 and 63 issued. Certificate Nos. 62 and 63 given up, and certificate No. 65, for 150 shares issued, $15,000; paid 30 per cent., $4,500; unpaid and charged to discount account, $10,500, which is due and unpaid.

GEORGE BROWN.—Original certificate No. 17, 100 shares, surrendered, and certificate No. 49 issued to Jas. M. Beebee. Certificate No. 49 surrendered, and certificate No. 98 issued for 150 shares. Transfer Nos. 45 and 46 of James M. Beebee to Geo. Brown, by certificate No. 151, 85 shares, $8,500; paid on and above 33⅓ per cent., $2,833.33; amount due and unpaid, $5,666.67.

102 CHARLES POWERS.—Original certificate No. 17, 100 shares surrendered. Certificate No. 49 issued in lieu to James M. Beebee. Certificate No. 49 surrendered, and certificate No. 98 issued for 150 shares, $15,000. Transfer No. 45 and 46 of James M. Beebee to Charles Powers, by certificate No. 152, 65 shares, $6,500; paid on the same 33⅓ per cent., $2,166.66; unpaid and due, $4,333.34.

S. W. PHILLIPS.—Certificate No. 83 issued to James Ritchie. Transfer No. 23 to S. W. Phillips, 1 share, $100; unpaid and charged to discount account, $50; which is due and unpaid.

WILLIAM F. WELD.—Certificate No. 93, issued for 75 shares, $7,500; paid on this stock 50 per cent., $3,750; unpaid and charged to discount account, $3,750.

C. O. GODFREY.—Certificate No. 139, issued October 14, 1875, 10 shares, $1,000; 50 per cent. paid, $500; amount unpaid and charged to discount account, $500.

(Endorsed:) 395. In re Fort Scott Coal and Mining Company. Bankrupt statement of shares of stock. Exhibit A. Filed March 31, 1876, at 2 p. m. J. C. Wilson, clerk.

103 EXHIBIT B.

In the matter of the Fort Scott Coal and Mining Company, bankrupt.

| Names of stockholders. | No. of shares. | Par val. of stock. | Amount paid for stock. | Amount due on stock. |
|---|---|---|---|---|
| Godfrey, C. O. | 10 | $1,000 | $500 | $500 |
| Bartlett, Sidney | 150 | 15,000 | 5,300 | 9,650 |
| Thayer, Nathaniel | 870 | 87,000 | 38,650 | 48,350 |
| Forbes, J. N. | 150 | 15,000 | 6,500 | 8,500 |
| Bigelow, H. J. | 200 | 20,000 | 8,000 | 12,000 |
| Price, Edward | 2 | 200 | 100 | 100 |
| Hooper, S. | 225 | 22,500 | 9,250 | 13,250 |
| Kell, John | 305 | 30,000 | 13,750 | 16,750 |
| Beebe, J. M. | 75 | 7,500 | 3,750 | 3,750 |
| Brown, George | 85 | 8,500 | 3,400 | 5,100 |
| Powers, Charles | 65 | 6,500 | 2,600 | 3,900 |
| Beal, James H. | 305 | 30,500 | 13,750 | 16,750 |
| Brooks, J. W. | 150 | 15,000 | 6,500 | 8,500 |
| Dennison, J. N. | 100 | 10,000 | 4,000 | 6,000 |
| Burnham, J. A. | 200 | 20,000 | 9,000 | 11,000 |
| Blake, J. H. | 85 | 8,500 | 4,050 | 4,450 |
| Hardy, Alpheus | 120 | 12,000 | 6,000 | 6,000 |
| Putnam, George | 200 | 20,000 | 9,000 | 11,000 |
| Iasigi, J. | 150 | 15,000 | 7,500 | 7,500 |
| Warren, Geo. W. & Co. | 150 | 15,000 | 7,500 | 7,500 |
| Weld, Wm. F. | 145 | 14,500 | 7,250 | 7,250 |
| Weld, Wm. G. | 150 | 15,000 | 5,550 | 9,450 |
| Watson, R. S. | 50 | 5,500 | 2,500 | 2,500 |
| Griswold, J. N. A. | 55 | 5,500 | 2,750 | 2,750 |
| De Forest, A. W. | 1 | 100 | 50 | 50 |
| Hall, John | 1 | 100 | 50 | 50 |
| Phillips, S. W. | 1 | 100 | 50 | 50 |
| Totals | 4,000 | $400,000 | $177,350 | $222,650 |

(Endorsed:) 395. Exhibit B, giving names of stockholders, amount of each one's stock, and amount due from each. Filed March
104 31st, 1876. J. C. Wilson, clerk. In the matter of the Fort Scott Coal and Mining Company, bankrupts, vs. The Stockholders of said Company.

EXHIBIT C.

In the matter of Fort Scott Coal and Mining Company, bankrupts.

GENERAL STATEMENT.

| | |
|---|---|
| Total amount of liabilities, including those which have not been passed upon | $105,682 45 |
| Estimated amount of expenses to be incarred in settling the estate | 32,695 00 |
| Total liabilities | $138,377 45 |
| Assets of company | 13,692 66 |
| Balance of liabilities over assets | $124,684 79 |

(Endorsed:) 395. General statement of assets and liabilities. Exhibit C. Filed March 31, 1876, at 2 p. m. J. C. Wilson.

United States district court in and for the district of Kansas.

In the matter of the Fort Scott Coal and Mining Company of Kansas, a bankrupt.

*Amended petition of G. A. Scovill and T. H. Annable, assignees, asking for an assessment of stock upon the stockholders of the said bankrupt company.*

And now come the assignees above named, and by way of amended petition to their petition for assessment of stock filed in this court, March 31st, 1876 (leave of the court therefor being first had and obtained), respectfully represent that an assessment of seventy-six per cent. upon the par value of each share of stock in said company,
105 if credited with the amount paid by each stockholder heretofore, would equalize the burden upon the stockholders, and also bring into the hands of your petitioners a sufficient amount to pay the debts of the company; your petitioners therefore pray that they may be authorized and directed to make a call and assessment of seventy-six dollars ($76.00) upon each share of the stock in said company, or seventy-six per centum of the whole amount of said capital stock; and that upon this call and assessment your petitioners be directed to credit any and all amounts paid by each stockholder upon his respective shares only requiring the said stockholder to pay the difference between the said call and assessment and the amount he has paid thereon, and to make a call and assessment for said difference. Your petitioners further pray that the court will order and direct the details of such call, and the service of notice upon stockholders, if any be required, and this without prejudice to a further call and assessment upon said stock if the same should become necessary.

McCOMAS & McKEIGHAN,
C. W. BLAIR,
*Solicitors for Petitioners.*

(Endorsed:) No. 395. U. S. district court, district of Kansas. In the matter of the assessment of stock of the Fort Scott Coal and Mining Company, a bankrupt. Amended petition. Filed June 10th, 1876, at 3 p. m. J. C. Wilson, clerk. McComas & McKeighan and C. W. Blair, attorneys for petitioners.

In the district court of the United States, district of Kansas.

FRIDAY, *June 10th, A. D.* 1876.

Present: the Hon. C. G. FOSTER, *Judge.*

In the matter of the Fort Scott Coal and Mining Company, of Kansas, a bankrupt, on petition of its assignees, G. A. Scoville and T. H. Annable, for an order and decree to assess the stockholders.

The said assignees having heretofore, viz, 31st day of March, A. D. 1876, filed their petition in said court, setting forth the con-
106 dition of its assets, liabilities, and resources, with a statement of amount of unpaid stock, names and residences of stockholders, and a rule having been made by said court on said filing of said petition, requiring the said stockholders to show cause why an assessment should not be made, according to the prayer of said peti-

tion; which said rule was made returnable on the 21st day of April, A. D. 1876, and extended to this day, viz, the 10th day of June, A. D. 1876, by consent of stockholders and said assignees, and the order of said court; said rule, and petition, and amendment thereto, came on for hearing on the exceptions and objections of stockholder R. S. Watson, appearing for himself and all others desiring to avail themselves of said exceptions. The said R. S. Watson appearing by his attorneys, S. O. Thatcher and James Grant, and the said assignees by their attorneys, McComas & McKeighan and C. W. Blair. The said exceptions and objections having been argued and submitted to the court, the court being fully advised, overruled said exceptions and objections, to which ruling of the court the said stockholder duly excepted. Whereupon an amendment, by leave of said court, was filed to said petition. Whereupon said cause came up for trial. On consideration of which, after argument of cause, the court, being now fully advised and informed concerning the same, it appearing that said rule has been served as directed, adjudges and decrees that the material allegations in said petition and amendment thereto are true; that the capital stock of said bankrupt has become and now is liable to assessment by this court for the full amount unpaid thereon, for the purpose of paying all claims, properly provable in bankruptcy, against said bankrupt corporation, and the expense of collecting such assessment, and of the bankrupt proceedings; and that it is now necessary to make assessment of seventy-six dollars on each share of stock, to pay the said debts and expenses, in the manner prayed for by said assignees. Whereupon, on motion of C. W. Blair and McComas & McKeighan, attorneys of said assignees, it is by the court further ordered, adjudged, and decreed that, for the aforesaid purposes, a call and assessment be and the same are hereby made upon the capital stock and stockholders of the Fort Scott Coal and Mining Company, of Kansas, the bankrupt herein, of seventy-six per centum of the par
107 volue of said stock, being seventy-six dollars on each and every share thereof; upon which call and assessment shall be credited to each stockholder any amounts paid heretofore by him or his assignor for or on said shares, and each and every holder of stock in said company is required to pay the amount hereby assessed and called for, viz, seventy-six dollars on each share, less amount already paid, to the said G. A. Scovill and T. H. Annable, the assignees of said bankrupt, at the office of Frederick Scovill, a register in bankruptcy of said court, in the city of Fort Scott, Kansas, on or before the 1st day of August, A. D. 1876, and in default of such payment the assignees are directed to sue for and collect the same; and if the amount realized from the said assessment shall prove insufficient for the purpose, the said assignees will report the deficiency to this court for further action thereon. It is further ordered that the said assignees make a call and assessment in accordance herewith, and file the same in this court, within twenty days from the date hereof, and that they cause a copy thereof and of this decree to be served on or mailed to each of said stockholders, directed to him at his usual place of residence, as shown by the books and records of said bankrupt, or as may be known to the said assignees, on or before the 21st day of July, A. D. 1876, and such notice shall be sufficient; and the affidavit of the assignees, or one of them, shall be sufficient evidence of the facts therein stated in regard to the same.

C. G. FOSTER, *Judge.*

(Endorsed:) 395. In the matter of the Fort Scott Coal and Mining

Company, a bankrupt. Order and decree of assessment. Filed June 10th, 1873, at 3 p. m. J. C. Wilson clerk.

UNITED STATES OF AMERICA,
*District of Kansas, ss:*

I, J. C. Wilson, clerk of the district court of the United States for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy of petition, Exhibits A, B, and C, amended petition, order and decree of assessment, in the matter of the Fort Scott Coal and Mining Company, a bankrupt, with all endorsements thereon.

108 In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 16th day of June, A. D. 1876.

[SEAL.] J. C. WILSON, *Clerk.*

Afterwards, on the 21st day of July, 1876, there was filed in said court the following petition of the assignees of said company, with the order thereon, which are in words and figures as follows:

UNITED STATES OF AMERICA,
*District of Kansas, ss:*

In the district court of the United States sitting within and for said district.

In the matter of the Fort Scott Coal and Mining Company of Kansas, a bankrupt.

To the Hon. G. C. Foster, judge of said court:

Your petitioners would respectfully represent that they are the only elected and qualified assignees of the Fort Scott Coal and Mining Company, a bankrupt; that, as such assignees, your petitioners did, on the 31st day of March, A. D. 1876, file a petition in your court asking an assessment on the stockholders of the said Fort Scott Coal and Mining Company, sufficient to enable your petitioners to pay the indebtedness of said bankrupt; that said petition was accompanied by exhibits and statements showing the condition of said bankrupt, its assets and liabilities; also the names of its stockholders, and the amount paid by each one on his shares of stock held or owned by him; that afterwards, to-wit, on the 10th day of June, A. D. 1876, your petitioners filed an amended petition, leave of the court being first had and obtained, that on the said 10th day of June, 1876, and after the filing of said amended petition, your honor issued an order and decree containing, among other things, the following clause, to wit: "* * * It is further ordered that said assignees make a call and assessment in accordance herewith, and file the same in this court,

109 twenty days from date hereof. * * *" Your petitioners would respectfully represent that, owing to the amount of labor required of them in making this call and assessment and the amount of printing required to be done, which had to be done under their immediate and personal supervision, and owing to the limited capacity of the printing office in this place, your petitioners have been unable to comply with that portion of the order requiring the filing of the copy of the call and assessment, on or before the first day of July, A. D. 1876. Your petitioners would therefore ask for further time in

which to file the said call and assessment in your court, and they be now allowed to file the same.

G. A. SCOVILL,
T. H. ANNABLE,
*Assignees.*

Sworn to and subscribed before me this 15th day of July, A. D. 1876.
(Signed) W. C. PERRY,
*Notary Public, Bourbon Co., Kansas.*

ATCHISON, *July* 17, 1876.

On reading and filing the foregoing petition, it is ordered that said assignees have leave now to file the call and assessment therein referred to.

C. G. FOSTER, *Judge.*

(Endorsed:) No. 395. In re Fort Scott Coal and Mining Company, in bankruptcy. Assessment of stockholders. Filed July 15th, 1876, at 1 p. m. C. G. Foster, judge. Filed July 21st, 1876, 9 a. m., J. C. Wilson, clerk.

Afterwards, on the 17th day of July, A. D. 1876, there was filed in said court, by said assignees, the following assessment, which was and is in words and figures as follows:

110 United States district court.

In the matter of the Fort Scott Coal and Mining Company, a bankrupt.

*Assessment of stock.*

In pursuance of the order of the court, made herein on the 10th day of June, 1876, and under and by virtue thereof, and of the authority vested in us as assignees in bankruptcy of the Fort Scott Coal and Mining Company, of Kansas, a bankrupt, we, as such assignees, do hereby make an assessment and call upon the capital stock and stockholders of said corporation, a bankrupt, to the amount of seventy-six per cent. of the par value held by each of such stockholders upon each share thereof. Upon which call and assessment there shall be credited to each stockholder any amount that may have been paid upon any share of stock held by him. This assessment is made for the purpose of raising money to pay the debts and liabilities incurred by said corporation and company in the course of its business, and the costs and expenses of the said bankruptcy, and of the proceedings herein, and the collection of this assessment; and the necessity authorizing and requiring such assessment is now declared to have arisen, and each of the stockholders of said company of said corporation is hereby ordered and required to pay the amount hereby assessed and called for from him, at the office of Frederick Scovill, in the city of Fort Scott, Kansas, one of the registers in bankruptcy of said court, on or before the first day of August, 1876.

G. A. SCOVILL.
T. H. ANNABLE.

FORT SCOTT, KANSAS, *July* 1, 1876.
(Endorsed:) Filed July 17th, 1876. J. C. Wilson, clerk.

Afterwards, on the 4th day of December, 1876, there was filed in said

court the following order of Hon. John F. Dillon, judge of the circuit of the United States for the district of Kansas, which was and is in words and figures as follows:

111 In the circuit court of the United States, district of Kansas.

In the matter of the petition of R. S. Watson, for himself and others, to review the assessment of the unpaid stock of the Fort Scott Coal and Mining Company of Kansas, a bankrupt, made by the United States district court of Kansas, the tenth day of June, A. D. 1876, on the application of G. A. Scovill and T. H. Annable, assignees of said bankrupt.

Now, at this day came the said petitioners by Grant and Smith, their attorneys, and the said assignees by their attorneys, McComas & McKeighan and C. W. Blair, whereupon the said court rendered its decision on said petition of review heretofore submitted by consent of said parties in vacation to Hon. John F. Dillon, judge of said court, and directed the following order to be made, viz, that the said order and decree of assessment of stock sought to be reversed by said petition for review be, and the same is, hereby affirmed in all things, with this modification, that the said district court enter an order allowing each stockholder of said bankrupt company who shall pay the amount of said assessment on his stock without suit, in ninety days from this twenty-ninth day of November, A. D. 1876, a credit on his or her proportion of the amount so assessed, as was included in said assessment for the purpose of paying the costs of enforcing by suit the collection of said assessment; the amount to be so credited in conformity with this order to be ascertained by the said district court; to which court the matter, together with this order, is hereby remanded.

(Signed) JOHN F. DILLON, *Judge.*

And on said 4th day of December, A. D. 1876, there was made and filed in said district court the following order, which was and is in words and figures as follows:

112 In the district court of the United States, district of Kansas.

In the matter of the assessment on unpaid stock of the Fort Scott Coal and Mining Company, a bankrupt, at Topeka, in said district.

Present: Hon. C. G. Foster, judge of said court; J. C. Wilson, clerk; Charles Miller, marshal.

DECEMBER 4, A. D. 1876.

Now at this day came on for hearing the application of G. A. Scovill and T. H. Annable, assignees of the said bankrupt, appearing by McComas & McKeighan and C. W. Blair, their attorneys, and it being represented in said application, and shown on the hearing thereof, that R. S. Watson, one of said company's stockholders, appearing for himself and others to resist the assessment on the unpaid stock of said company, made on the tenth day of June, A. D. 1876, subsequent thereto, sought by petition in review, directed to Hon. John F. Dillon, judge of the circuit court of the United States for Kansas, to reverse and set aside the said assessment, and it appearing and being shown that the said Hon. John F. Dillon, judge of said court at Topeka, in said district, on the wenty-ninth day of November, A. D. 1876, after hearing the same,

affirmed said assessment in all things, with this modification, that this court enter an order allowing a credit on the said unpaid stock in favor of each stockholder who in ninety days from the twenty-ninth day of November, A. D. 1876, should pay without suit the amount chargeable against him or her by virtue of said assessment, said credit to be equal to the amount included in said assessment, for the cost and expenses of enforcing by suit said assessment, which amount was directed to be ascertained by this court. Now, then, it being represented and shown by said assignees that not more than ten per cent. of the said assessment was included for said purpose, and that a credit of such amount would be just, it is ordered and directed that there be, and there is, hereby allowed a credit of ten per cent. on the amount chargeable to each stockholder by virtue of said assessment, who shall in ninety days from the twenty-ninth day of November, A. D. 1876, pay the
113 amount due on said assessment and call, less said credit, according to the terms thereof. The said assignees are directed to send within thirty days a copy of this order by mail to the address of said stockholders of said bankrupt as shown by the books thereof, postage prepaid.

(Signed) C. G. FOSTER, *Judge.*

UNITED STATES OF AMERICA,
*District of Kansas, ss:*

In the matter of the Fort Scott Coal and Mining Company, bankrupt. Transcript of proceedings in reference to assessment of stock, etc.

I, J. C. Wilson, clerk of the district court of the United States of America for the district of Kansas, do hereby certify the foregoing to be true, full, and perfect copies of the petition in bankruptcy and depositions thereto; order made thereon; order to show cause and return of marshal; order of adjudication and reference; memorandum of first meeting of creditors; acceptance of assignees, approval thereof; petition of assignees and amendment thereto for assessment of stock; rule to show cause, decree, and order of court thereon; petition of assignees for extension of time to make assessment with order thereon; assessment of assignees; order of Jno. F. Dillon, judge of the U. S. circuit court for said district, with respect to said assessment; order of said district court in pursuance of last-mentioned order, with all indorsements thereon, as the same are on file and of record in my office in the matter of the Fort Scott Coal and Mining Company, a bankrupt.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 4th day of December, A. D. 1877.

[SEAL.] J. C. WILSON, *Clerk.*

114 *G.—Assignment of bankrupt effects Fort Scott Coal and Mining Company to G. A. Scovill and Thomas H. Annable.*

In the district court of the United States for the district of Kansas.

In the matter of Fort Scott Coal and Mining Company in bankruptcy, bankrupt.

DISTRICT OF KANSAS, *ss:*

Know all men by these presents, that we, Gustavus A. Scovill and Thomas H. Annable, of the city of Fort Scott, in the county of Bourbon

and State of Kansas, in said district, have been duly appointed assignees of the Fort Scott Coal and Mining Company, bankrupt, in said matter:

Now, therefore, I, Cyrus O. French, register in bankruptcy for said district, by virtue of the authority vested in me by the fourteenth section of an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, do hereby convey and assign to the said Gustavus A. Scovill and Thomas H. Annable, assignees as aforesaid, all the estate, real and personal, of the said Fort Scott Coal and Mining Company, bankrupt aforesaid, including all the property, of whatever kind of which it is possessed, or in which it was interested or entitled to have on the 2d day of April, A. D. 1874, with all its deeds, books, and papers relating thereto; excepting such property as is exempted from the operation of this assignment by the provisions of said fourteenth (14th) section of said act.

To have and to hold all the foregoing premises of the said Fort Scott Coal and Mining Company and its heirs forever, in trust, nevertheless, for the use and purposes, with the powers, and subject to the conditions and limitations set forth in said act.

In witness whereof I, the said register in bankruptcy, have hereunto set my hand this 4th day of May, A. D. 1874.

CYRUS O. FRENCH,
*Register in Bankruptcy.*

115 Recorded on the 16th day of May, A. D. 1874, at 9 o'clock a. m.

D. T. HIATT,
*Register of Deeds.*

STATE OF KANSAS,
*County of Bourbon, ss:*

This instrument, filed on this 16th day of May, 1874, at 9 o'clock a. m., and recorded in book T of deeds, at page 186.

D. T. HIATT,
*Register.*

STATE OF KANSAS,
*County of Bourbon, ss:*

I, D. T. Hiatt, the register of deeds in and for the aforesaid county and State, do hereby certify that the within and foregoing is a true and correct copy of an assignment of bankrupts now on record in book T of deeds, page 186, in my office.

In witness whereof I hereunto set my hand and affix my official seal on this 21st day of November, 1877.

[SEAL.]

D. T. HIATT,
*Register of Deeds.*

*H.—Proxies and powers by substitution.*

1. Know all men by these presents, that I, the undersigned, stockholder in the Fort Scott Coal and Mining Company, do hereby constitute and appoint J. W. Johnston, of Fort Scott, Kansas, my true and lawful attorney, with power of substitution, for me and in my name, to vote at a meeting of the stockholders in said company, due notice of which has been given, to be held at the office of the company, in Fort Scott, Kan-

sas, on the 15th day of October, A. D. 1872, or at any adjournment thereof, on all matters which may properly come before it, with all the powers I should possess if personally present.

In testimony whereof I have hereunto set my hand and seal this 24th day of September, 1872.

GEO. PUTNAM. [SEAL.]

Witness:
COLMAN HARRIS.

hereby appoint, irrevocably,
as substitute, with all the powers above given.
Witness hand and seal this day of 187 .
[SEAL.]

Witness:

2. Know all men by these presents that I, the undersigned stockholder in the Fort Scott Coal and Mining Company, do hereby constitute and appoint J. W. Johnston, of Fort Scott, Kansas, my true and lawful attorney, with power of substitution, for me and in my name, to vote at a meeting of the stockholders of said company, due notice of which has been given, to be held at the office of the company, in Fort Scott, Kansas, on the 15th day of October, A. D. 1872, or at any adjournment thereof, on all matters which may properly come before it, with all the powers I should possess if personally present.

In testimony whereof I have hereunto set my hand and seal this 25th day of September, 1872.

N. THAYER. [SEAL.]

Witness:
JAMES H. BLAKE.

hereby appoint, irrevocably,
as a substitute, with all the powers above given.
Witness hand and seal this day of 187 .
[SEAL.]

Witness:

3. Know all men by these presents that I, the undersigned stockholder in the Fort Scott Coal and Mining Company, do hereby constitute and appoint J. W. Johnston, of Fort Scott, Kansas, my true and lawful attorney, with power of substitution, for me and in my name, to vote at a meeting of the stockholders in said company, due notice of which has been given, to be held at the office of the company, in Fort Scott, Kansas, on the 15th day of October, A. D. 1872, or at any adjournment thereof, on all matters which may properly come before it, with all the powers I should possess if personally present.

117 In testimony whereof I have hereunto set my hand and seal this 25th day of September, 1872.

JAMES H. BLAKE. [SEAL.]

Witness:
COLMAN HARRIS.

hereby appoint, irrevocably,
as substitute, with all the powers above given.
Witness hand and seal this day of 187 .
[SEAL.]

Witness:

4. Know all men by these presents that I, the undersigned stockholder in the Fort Scott Coal and Mining Company, do hereby con-

stitute and appoint J. W. Johnston, of Fort Scott, Kansas, my true and lawful attorney, with power of substitution, for me and in my name, to vote at a meeting of the stockholders in said company, due notice of which has been given, to be held at the office of the company, in Fort Scott, Kansas, on the 15th day of October, A. D. 1872, or at any adjournment thereof, on all matters which may properly come before it, with all the powers I should possess if personally present.

In testimony whereof I have hereunto set my hand and seal this 24th day of September, 1872.

JAS. M. BEEBE. [SEAL.]

Witness:
E. PIERSON BEEBE.

hereby appoint, irrevocably,
as substitute, with all the powers above given.
Witness hand and seal this day of 187 .

[SEAL.]

Witness;

5. Know all men by these presents that I, the undersigned stockholder in the Fort Scott Coal and Mining Company, do hereby constitute and appoint J. W. Johnston, of Fort Scott, Kansas, my true and lawful attorney, with power of substitution, for me and in my name,
to vote at a meeting of the stockholders of said company, due no-
118 tice of which has been given, to be held at the office of the company, in Fort Scott, on the 15th day of October, A. D. 1872, or at any adjournment thereof, on all matters which may properly come before it, with all the powers I should possess if personally present.

In testimony whereof have hereunto set my hand and seal this 23d day of September, 1872.

S. BARTLETT. [SEAL.]

Witness:

hereby appoint, irrevocably,
as substitute, with all the powers above given.
Witness hand and seal this day of 187 .

[SEAL.]

Witness:

6. Know all men by these presents that I, the undersigned stockholder in the Fort Scott Coal and Mining Company, do hereby constitute and appoint J. W. Johnston, of Fort Scott, Kansas, my true and lawful attorney, with power of substitution, for me and in my name, to vote at a meeting of the stockholders in said company, due notice of which has been given, to be held at the office of the company, in Fort Scott, on the 15th day of October, A. D. 1872, or at any adjournment thereof, on all matters which may properly come before it, with all the powers I should possess if personally present.

In testimony whereof I have hereunto set my hand and seal this 24th day of September, 1872.

S. HOOPER. [SEAL.]

Witness:
T. F. HOOPER.

hereby appoint, irrevocably,
as substitute, with all the powers above given.
Witness hand and seal this day of 187 .

[SEAL.]

Witness:

7. Know all men by these presents that I, the undersigned stockholder in the Fort Scott Coal and Mining Company, do hereby constitute and appoint J. W. Johnston, of Fort Scott, Kansas, my true and lawful attorney, with power of substitution, for me and in
119 my name, to vote at a meeting of the stockholders in said company, due notice of which has been given, to be held at the office of the company, in Fort Scott, on the 15th day of October, A. D. 1872, or at any adjournment thereof, on all matters which may properly come before it, with all the powers I should possess if personally present.

In testimony whereof I have hereunto set hand and seal this day of 187 .

JAS. H. BEAL. [SEAL.]

Witness:
T. S. BEAL.

hereby appoint, irrevocably,
as substitute, with all the powers above given.
Witness hand and seal this day of 187 .

[SEAL.]

Witness:

8. Know all men by these presents that I, the undersigned stockholder in the Fort Scott Coal Mining Company, do hereby constitute and appoint C. O. Godfrey, of , my true and lawful attorney, with power of substitution, for me and in my name, to vote at a meeting of the stockholders in said company, due notice of which has been given, to be held at the office of the company, in Fort Scott, Kansas, on the 15th day of October, 1872, or at any adjournment thereof, on all matters which may properly come before it, with all the powers I should possess if personally present.

In testimony whereof I have hereunto set my hand and seal this 25th day of September, 1872.

ALPHEUS HARDY, [SEAL.]
By J. W. DAVIS, *Att'y.*

Witness:
C. K. MERRILL.

I hereby appoint, irrevocably, J. W. Johnston as my substitute, with all the powers above given.

Witness my hand and seal this 4th day of Oct., 1872.

Witness: [SEAL.]

120 9. Know all men by these presents that I, the undersigned stockholder in the Fort Scott Coal and Mining Company, do hereby constitute and appoint James Ritchie, of Fort Scott, Kansas, my true and lawful attorney, with power of substitution, for me and in my name, to vote at a meeting of the stockholders in said company, due notice of which has been given, to be held at the office of the company, in Fort Scott, Kansas, on the 15th day of October, A. D. 1872, or at any adjournment thereof, on all matters which may properly come before it, with all the powers I should possess if personally present.

In testimony whereof I have hereunto set my hand and seal this 21st day of September, 1872.

J. W. BROOKS. [SEAL.]

Witness:
J. W. ANDERSON.

hereby appoint, irrevocably, as substitute, with all the powers above given.

Witness hand and seal this day of 187 .

[SEAL.]

Witness:

10. Know all men by these presents that I, the undersigned stockholder in the Fort Scott Coal and Mining Company, do hereby constitute and appoint C. O. Godfrey my true and lawful attorney, with power of substitution, for me and in my name, to vote at a meeting of the stockholders in said company, due notice of which has been given, to be held at the office of the company, in Fort Scott, on the 15th day of October, A. D. 1872, or at any adjournment thereof, on all matters which may properly come before it, with all the powers I should possess if personally present.

In testimony whereof have hereunto set hand and seal this day of 187 .

H. J. BIGELOW. [SEAL.]

Witness:

I hereby appoint, irrevocably, James Ritchie as my substitute, with all the powers above given.

Witness my hand and seal this 14th day of October, 1872.

C. O. GODFREY. [SEAL.]

Witness:
GEO. M. THORNTON.

121 11. Know all men by these presents that I, the undersigned stockholder in the Fort Scott Coal and Mining Company, do hereby constitute and appoint Edward Price, of Hannibal, my true and lawful attorney, with power of substitution, for me and in my name, to vote at a meeting of the stockholders in said company, due notice of which has been given, to be held at the office of the company, in Fort Scott, Kansas, on the 24th day of December, A. D. 1872, or at any adjournment thereof, on all matters which may properly come before it, with all the powers I should possess if personally present.

In testimony whereof have hereunto set hand and seal this day of , 187 .

S. HOOPER. [SEAL.]

Witness:
JOHN A. PETERS.

I hereby appoint, irrevocably, S. W. Phillips as my substitute, with all the powers above given.

Witness my hand and seal this 21st day of December, 1872.

EDWARD PRICE. [SEAL.]

Witness:
JNO. F. E. PHILLIPS.

Two hundred and twenty-five shares "for the increase."

SAMUEL HOOPER,
By S. W. PHILLIPS, *Attorney.*

12. Know all men by these presents that I, the undersigned stockholder in the Fort Scott Coal and Mining Company, do hereby constitute and appoint Edward Price, of Hannibal, my true and lawful attorney, with power of substitution, for me and in my name, to vote at a meeting of the stockholders in said company, due notice of which has

been given, to be held at the office of the company, in Fort Scott, Kansas, on the 24th day of December, A. D. 1872, or at any adjournment thereof, on all matters which may properly come before it, with all the powers I should possess if personally present.

In testimony whereof I have hereunto set my hand and seal this 12th day of December, 1872.

J. W. BROOKS. [SEAL.]

Witness:

J. HENRY BROOKS.

122 I hereby appoint, irrevocably, S. W. Phillips as my substitute, with all the powers above given.

Witness my hand and seal this 21st day of December, 1872.

EDWARD PRICE. [SEAL.]

Witness:

JNO. F. E. PHILLIPS.

One hundred shares "for the increase."

J. W. BROOKS,
By S. W. PHILLIPS, *Attorney.*

13. Know all men by these presents that I, the undersigned stockholder in the Fort Scott Coal and Mining Company, do hereby constitute and appoint Edward Price, of Hannibal, my true and lawful attorney, with power of substitution, for me and in my name, to vote at a meeting of the stockholders in said company, due notice of which has been given, to be held at the office of the company, in Fort Scott, Kansas, on the 24th day of December, A. D. 1872, or at any adjournment thereof, on all matters which may properly come before it, with all the powers I should possess if personally present.

In testimony whereof I have hereunto set my hand and seal this 12th day of December, 1872.

S. BARTLETT. [SEAL.]

Witness:

I hereby appoint, irrevocably, S. W. Phillips as my substitute, with all the powers above given.

Witness my hand and seal this 21st day of December, 1872.

EDWARD PRICE. [SEAL.]

Witness:

JNO. F. E. PHILLIPS.

One hundred and fifty shares "for the increase."

S. BARTLETT,
By S. W. PHILLIPS, *Attorney.*

14. Know all men by these presents that I, the undersigned stockholder in the Fort Scott Coal and Mining Company, do hereby
123 constitute and appoint Edward Price, of Hannibal, my true and lawful attorney, with power of substitution, for me and in my name, to vote at a meeting of the stockholders in said company, due notice of which has been given, to be held at the office of the company, in Fort Scott, Kansas, on the 24th day of December, A. D. 1872, or at any adjournment thereof, on all matters which may properly come before it, with all the powers I should possess if personally present.

In testimony whereof I have hereunto set my hand and seal this 12th day of December, 1872.

JOHN A. BURNHAM. [SEAL.]

Witness:
J. A. BURNHAM, JR.

I hereby appoint, irrevocably, S. W. Phillips as substitute, with all the powers above given.
Witness my hand and seal this 21st day of December, 1872.

EDWARD PRICE. [SEAL.]

Witness:
JNO. F. E. PHILLIPS.

One hundred and fifty shares "for the increase."

JNO. A. BURNHAM,
By S. W. PHILLIPS, *Attorney.*

15. Know all men by these presents that I, the undersigned stockholder in the Fort Scott Coal and Mining Company, do hereby constitute and appoint Edward Price, of Hannibal, my true and lawful attorney, with power of substitution, for me and in my name, to vote at a meeting of the stockholders in said company, due notice of which has been given, to be held at the office of the company, Fort Scott, Kansas, on the 24th day of December, A. D. 1872, or at any adjournment thereof, on all matters which may properly come before it, with all the powers I should possess if personally present.
In testimony whereof have hereunto set hand and seal this 12th day of December, 1872.

JAS. M. BEEBE. [SEAL.]

Witness:
E. PIERSON BEEBE.

124 I hereby appoint, irrevocably, S. W. Phillips as my substitute, with all the powers above given.
Witness my hand and seal this 21st day of December, 1872.

EDWARD PRICE. [SEAL.]

Witness:
JNO. F. E. PHILLIPS.

Two hundred and twenty-five shares "for the increase."

JAS. M. BEEBE,
By S. W. PHILLIPS, *Attorney.*

16. Know all men by these presents that I, the undersigned stockholder in the Fort Scott Coal and Mining Company, do hereby constitute and appoint Edward Price, of Hannibal, Missouri, my true and lawful attorney, with power of substitution, for me and in my name, to vote at a meeting of the stockholders in said company, due notice of which has been given, to be held at the office of the company, in Fort Scott, Kansas, on the 24th day of December, A. D. 1872, or at any adjournment thereof, on all matters which may properly come before it, with all the powers I should possess if personally present.
In testimony whereof I have hereunto set my hand and seal this 12th day of December, 1872.

JAMES H. BLAKE. [SEAL.]

Witness:
C. G. WRIGHT.

I hereby appoint, irrevocably, S. W. Phillips as my substitute, with all the powers above given.

Witness my hand and seal this 21st day of December, 1872.

EDWARD PRICE. [SEAL.]

Witness:

JNO. F. E. PHILLIPS.

Thirty-five shares "for the increase."

JAMES H. BLAKE,
By S. W. PHILLIPS, *Attorney.*

125 17. Know all men by these presents that I, the undersigned stockholder in the Fort Scott Coal and Mining Company, do hereby constitute and appoint Edward Price, of Hannibal, Missouri, my true and lawful attorney, with power of substitution, for me and in my name, to vote at a meeting of the stockholders in said company, due notice of which has been given, to be held at the office of the company, in Fort Scott, Kansas, on the 24th day of December, A. D. 1872, or at any adjournment thereof, on all matters which properly come before it, with all the powers I should possess if personally present.

In testimony whereof I have hereunto set my hand and seal this 12th day of December, 1872.

ALPHEUS HARDY. [SEAL.]

Witness:

J. W. DAVIS.

I hereby appoint, irrevocably, S. W. Phillips as my substitute, with all the powers above given.

Witness my hand and seal this 21st day of December, 1872.

EDWARD PRICE. [SEAL.]

Witness:

JNO. F. E. PHILLIPS.

Eighty shares "for the increase,"

ALPHEUS HARDY,
By S. W. PHILLIPS, *Attorney.*

18. Know all men by these presents that I, the undersigned stockholder in the Fort Scott Coal and Mining Company, do hereby constitute and appoint Edward Price, of Hannibal, Missouri, my true and lawful attorney, with power of substitution, for me and in my name, to vote at a meeting of the stockholders in said company, due notice of which has been given, to be held at the office of the company, in Fort Scott, Kansas, on the 24th day of December, A. D. 1872, or at any adjournment thereof, on all matters which may properly come before it, with all the powers I should possess if personally present.

In testimony whereof I have hereunto set my hand and seal this 12th day of December, 1872.

N. THAYER. [SEAL.]

Witness:

COLMAN HARRIS.

126 I hereby appoint, irrevocably, S. W. Phillips as my substitute, with all the powers above given.

Witness my hand and seal this 21st day of December, 1872.

EDWARD PRICE. [SEAL.]

Witness:

JNO. F. E. PHILLIPS.

Four hundred and twenty shares "for the increase."

N. THAYER,
By S. W. PHILLIPS, *Attorney.*

19. Know all men by these presents that I, the undersigned stockholder in the Fort Scott Coal and Mining Company, do hereby constitute and appoint Edward Price, of Hannibal, Missouri, my true and lawful attorney, with power of substitution, for me and in my name, to vote at a meeting of the stockholders in said company, due notice of which has been given, to be held at the office of the company, in Fort Scott, Kansas, on the 24th day of December, A. D. 1872, or at any adjournment thereof, on all matters which may properly come before it, with all the powers I should possess if personally present.

In testimony whereof I have hereunto set my hand and seal this 12th day of December, 1872.

GEO. PUTNAM, [SEAL.]
By N. THAYER, *Attorney.*

Witness:
COLMAN HARRIS.

I hereby appoint, irrevocably, S. W. Phillips as my substitute, with all the powers above given.

Witness my hand and seal this 21st day of December, 1872.

EDWARD PRICE. [SEAL.]

Witness:
JNO. F. E. PHILLIPS.

One hundred and fifty shares "for the increase."

GEO. PUTNAM,
By S. W. PHILLIPS, *Attorney.*

20. Know all men by these presents that I, the undersigned stockholder in the Fort Scott Coal and Mining Company, do hereby constitute and appoint Samuel W. Phillips, of Fort Scott, my true
127 and lawful attorney, with power of substitution, for me and in my name, to vote at a meeting of the stockholders in said company, due notice of which has been given, to be held at the office of the company, in Fort Scott, Kansas, on the 24th day of December, A. D. 1872, or at any adjournment thereof, on all matters which may properly come before it, with all the powers I should possess if personally present.

In testimony whereof I have hereunto set my hand and seal this 21st day of December, 1872.

C. O. GODFREY. [SEAL.]

Witness:
JNO. F. E. PHILLIPS.

hereby appoint, irrevocably, ., as substitute, with all the powers above given.

Witness hand and seal this day of , 187 .

[SEAL.]

Witness:

Ten shares "for the increase."

C. O. GODFREY,
By S. W. PHILLIPS, *Attorney.*

21. Know all men by these presents that I, the undersigned stockholder in the Fort Scott Coal and Mining Company, do hereby constitute and appoint Edward Price, of Hannibal, my true and lawful

attorney, with power of substitution, for me and in my name, to vote at a meeting of the stockholders in said company, due notice of which has been given, to be held at the office of the company, in Fort Scott, Kansas, on the 24th day of December, A. D. 1872, or at any adjournment thereof, on all matters which may properly come before it, with all the powers I should possess if personally present.

In testimony whereof have hereunto set hand and seal this 12th day of December, 1872.

T. JEFFERSON COOLIDGE. [SEAL.]

Witness:
HENRY C. RICHARDS.

128 I hereby appoint, irrevocably, S. W. Phillips as my substitute, with all the powers above given.

Witness my hand and seal this 21st day of December, 1872.

EDWARD PRICE. [SEAL.]

Witness:
JNO. F. E. PHILLIPS.

Two hundred and twenty-five shares "for the increase."

T. JEFFERSON COOLIDGE,
By S. W. PHILLIPS, *Attorney.*

22. Know all men by these presents that I, the undersigned stockholder in the Fort Scott Coal and Mining Company, do hereby constitute and appoint S. W. Phillips, of Fort Scott, Kansas, my true and lawful attorney, with power of substitution, for me and in my name, to vote at a meeting of the stockholders in said company, due notice of which has been given, to be held at the office of the company, in Fort Scott, Kansas, on the 24th day of December, A. D. 1872, or at any adjournment thereof, on all matters which may properly come before it, with all the powers I should possess if personally present.

In testimony whereof I have hereunto set my hand and seal this 21st day of December, 1872.

EDWARD PRICE. [SEAL.]

Witness:
JNO. T. E. PHILLIPS.

hereby appoint, irrevocably, , as substitute, with all the powers above given.

Witness hand and seal this day of 187 .

[SEAL.]

Witness:

Twenty shares "for the increase."

EDWARD PRICE,
By S. W. PHILLIPS, *Attorney.*

129 I.—*Receipts for payments on account of stock.*

1. $22,500.] BOSTON, MASS., *Nov.* 29, 1872.

Received of Nathaniel Thayer twenty-two thousand five hundred dollars, same being full payment for four hundred and fifty shares capital stock of "The Fort Scott Coal and Mining Company." Certificate to be furnished by me as soon as it can be legally issued. Interest to be

allowed him, at rate of twelve per cent. per annum, from this date to day of delivery of stock.

C. O. GODFREY,
*Treasurer Fort Scott Coal and Mining Co. of Kan.*

Jan. 22, 1873: Certificate delivered and interest settled.

2. $4,000.] BOSTON, MASS., *Nov.* 29, 1872.

Received of James H. Beal four thousand dollars, same being full payment for eighty shares capital stock of "The Fort Scott Coal and Mining Company." Certificate to be furnished be me as soon as it can be legally issued. Interest to be paid him from this date, at the rate of twelve per cent. per annum, to day of the delivery of the stock.

C. O. GODFREY,
*Treasurer Fort Scott Coal and Mining Co. of Kan.*

Jan. 22, 1873: Certificate delivered and interest settled.

3. $4,000.] BOSTON, MASS., *Nov.* 29, 1872.

Received of T. Jefferson Coolidge four thousand dollars, same being in full payment for eighty shares of the capital stock of "The Fort Scott Coal and Mining Company." Certificate to be furnished by me as soon as it can be legally issued. Interest to be paid him, at rate of twelve per cent. per annum, from this date to day of delivery of stock.

C. O. GODFREY,
*Treasurer Fort Scott Coal and Mining Co. of Kan.*

Jan. 22, 1873: Certificate delivered and interest settled.

130 4. $2,500.] BOSTON, MASS., *Nov.* 29, 1872.

Received of J. A. Burnham twenty-five hundred dollars, same being full payment for fifty shares capital stock of "The Fort Scott Coal and Mining Company," Certificate to be furnished by me as soon as it can be legally issued. Interest to be paid him, at rate of twelve per cent. per annum, from this date to day of delivery of the stock.

C. O. GODFREY,
*Treasurer Fort Scott Coal and Mining Co. of Kan.*

Jan. 22, 1873: Certificate delivered and interest settled.

5. $3,500.] BOSTON, MASS., *Nov.* 30, 1872.

Received of William F. Weld thirty-five hundred dollars, same being full payment for seventy shares capital stock of "The Fort Scott Coal and Mining Company. Certificate to be furnished by me as soon as it can be legally issued. Interest to be paid him, at the rate of twelve per cent. per annum, from this day to time of delivery of stock.

C. O. GODFREY,
*Treasurer Fort Scott Coal and Mining Co. of Kan.*

Jan. 22, 1873: Certificate delivered and interest settled.

6. $7,500.] BOSTON, MASS., *Nov.* 29, 1872.

Received of Joseph Iasigi seventy-five hundred dollars, same being full payment for one hundred and fifty shares capital stock of "The Fort Scott Coal and Mining Company." Certificate to be furnished by me as soon as it can be legally issued. Interest to be allowed him, at

rate of twelve per cent. per annum, from this date to day of delivery of stock.

C. O. GODFREY,
*Treasurer Fort Scott Coal and Mining Co. of Kan.*

Jan. 22, 1873: Certificate delivered and interest settled.

131 7. $2,500.] BOSTON, MASS., *Nov.* 29, 1872.

Received of Rev. George Putnam twenty-five hundred dollars, same being in full payment for fifty shares capital stock of "The Fort Scott Coal and Mining Company." Certificate to be furnished by me as soon as it can be legally issued. Interest to be allowed him, at the rate of twelve per cent. per annum, from this date to day of delivery.

C. O. GODFREY,
*Treasurer Fort Scott Coal and Mining Co. of Kan.*

Jan. 22, 1873: Certificate delivered and interest settled.

8. $2,000.] BOSTON, MASS., *Nov.* 29, 1872.

Received of Alpheus Hardy two thousand dollars, same being full payment for forty shares capital stock of "The Fort Scott Coal and Mining Company." Certificate to be furnished by me as soon as it can be legally issued. Interest to be paid him, at the rate of twelve per cent. per annum, from this date to the day of delivery of stock.

C. O. GODFREY,
*Treasurer Fort Scott Coal and Mining Co. of Kan.*

Jan. 22, 1873: Certificate delivered and interest settled.

9. $7,500.] BOSTON, MASS., *Dec.* 5, 1872.

Received of Messrs. Geo. Warren & Co. seventy-five hundred dollars, in full payment for one hundred and fifty shares of capital stock of "The Fort Scott Coal and Mining Company." Certificate to be furnished by me as soon as same can be legally issued. Interest to be paid them, at rate of twelve per cent. per annum, from this date to day of delivery of the stock.

C. O. GODFREY,
*Treasurer Fort Scott Coal and Mining Co. of Kan.*

Jan. 22, 1873: Certificate delivered and interest settled.

132 10. $2,500.] BOSTON, MASS., *Nov.* 29, 1872.

Received of James H. Blake twenty-five hundred dollars, same being in full payment for fifty shares capital stock of "The Fort Scott Coal and Mining Company." Certificate to be furnished by me as soon as it can be legally issued. Interest to be paid him, at rate of twelve per cent. per annum, from this date to day of delivery of stock.

C. O. GODFREY,
*Treasurer Fort Scott Coal and Mining Co. of Kan.*

Jan. 22, 1873: Certificate delivered and interest settled.

11. $2,500.] BOSTON, MASS., *Nov.* 29, 1872.

Received of John W. Brooks twenty-five hundred dollars, same being full payment for fifty shares capital stock of "The Fort Scott Coal and Mining Company." Certificate to be furnished by me as soon as it can

be legally issued. Interest to be allowed him, at rate of twelve per cent. per annum, from this date to day of delivery of the stock.

C. O. GODFREY,
*Treasurer Fort Scott Coal and Mining Company of Kan.*

Jan. 22, 1873: Certificate delivered and interest settled.

No.

J.—*The Fort Scott Coal and Mining Company of Kansas.*

This is to certify that entitled to shares in the capital stock of the Fort Scott Coal and Mining Company of Kansas, transferable only on the books of the company, in person or by attorney, on the surrender of this certificate.

Witness the seal of the company and the signature of the president and secretary, at F't Scott, Kansas, this day of , 18 .

, *President.* [SEAL.]

, *Secretary.*

133 This cause was thence continued to the May term of this court, A. D. 1878, when, on the twenty-eighth day of May, A. D. 1878, the same came on to be heard and was fully heard, with the cause of the same plaintiffs v. Lemuel Shaw et al., executors, before the honorable Nathan Clifford, associate justice, and the honorable John Lowell, district judge, sitting together.

On the ninth day of October the opinion of the court is read by the honorable Nathan Clifford, and it is thereupon, to wit, Oct. 9, 1878, considered by the court that the said plaintiffs take nothing by their said writ, and that the said Nathaniel Thayer, defendant, recover of the said G. A. Scoville and Thomas H. Annable, assignees in bankruptcy of the Fort Scott Coal and Mining Company, his costs of suit, taxed at .

A true record.
Attest:

JOHN G. STETSON, *Clerk.*

A true copy of record.
Attest:

JOHN G. STETSON, *Clerk.*

134, 135 The following is a copy of the opinion of the court in the case of Gustavus A. Scoville et al., assignees, v. Lemuel Shaw et al., executors, which case was heard with the case of the same plaintiffs v. Nathaniel Thayer, and in accordance with which judgment for defendant was entered in said last-named case Oct. 9, 1878:

Circuit court of the United States, district of Massachusetts.

GUSTAVUS A. SCOVILLE ET AL., ASSIGNEES, *v.* LEMUEL SHAW ET AL., EXECUTORS. } No. 1001, law-docket.

Before Clifford and Lowell, JJ.

*Opinion of the court, October* 9, 1878.

CLIFFORD, J.:

Assignees in bankruptcy are appointed by the creditors of the bankrupt, and the provision is that as soon as the assignee is appointed and

qualified the judge, or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, and that such assignment shall relate back to the commencement of the proceedings in bankruptcy. (14 Stat. at Large, 522.)

Circuit courts have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity which may be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee touching any property or rights of property of said bankrupt, transferable to or vested in such assignee, but the same section provides that no suit at law or in equity shall, in any case, be maintainable by or against
136 such assignee, or by or against any person claiming an adverse interest touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee. (1 id., 518.) Certain other cases of like character are also described in the transcript as pending in the same court, but it is stated in the agreed statement that the case above mentioned is submitted to the court upon the statement of facts signed by the attorneys of the parties.

Sufficient appears to show that the complainants are the assignees in bankruptcy of the coal and mining company, which was incorporated November 25, 1870, and was adjudged bankrupt April 11, 1874, as appears by the record of the bankrupt proceedings. On the other hand, it appears that the respondents are the executors of Samuel Hooper, who died February 14, 1875, and that they were duly appointed as such executors on the fifteenth of March in the same year; that the coal and mining company was incorporated with a capital of one hundred thousand dollars, divided into shares of one hundred dollars each; that on the nineteenth of April of the next year the capital stock was increased from one to two hundred thousand dollars. Two additional issues of stock were made by the corporation: one October 16, 1872, of one hundred thousand dollars, the other December 27, in the same year, of a like amount. But the respondents deny that the corporation had any powers to issue any such additional stock, and claim that the certificates are ultra vires, and absolutely null and void.

It is agreed that the testator, at the time the company was adjudged bankrupt, then being in full life, held one hundred and fifty shares of the first two issues, upon which he had paid to the company forty dollars per share; that he also held of the third issue, on which he
137 had paid to the company fifty dollars per share. Proxies were executed by him September 24, 1872, and December 21, in the same year. By the terms of the first proxy he authorized the person therein named to vote at a meeting of the stockholders, to be held at the office of the company at the time therein mentioned, but there is no evidence that the person named attended the meeting or gave any vote. Whether he voted for the third issue of the stock, therefore, does not appear, but it does appear that he held at the same time mentioned seventy-five shares of the additional stock created at that meeting. None of the stock constituting the fourth issue was held by the decedent, but it appears that his proxy gave two hundred and twenty-five votes for the increase authorized at the meeting which increased the stock to four hundred thousand dollars.

Taken as a whole the complainants insist that the evidence contained in the agreed statement is sufficient to show that the testator of the

respondents was and is estopped to set up the defense that the last issue of the stock was without authority and invalid.

Difficulty would attend the solution of that question, but the court is of the opinion that it is not necessary to decide the question, for the reason given in Foreman v. Bigelow, that the claim is barred by the statute of limitations. Authorities referred to in that case will not, with one or two exceptions, be reproduced, nor will the reasons there given in support of the conclusion be repeated. Suffice it to say that it is now settled that the statute of limitations is as applicable in the national as in the State courts (Brown v. Heath, 15 Wall., 183; Ross v. Jones, 22 Wall., 576); and that the section of the bankrupt act referred to applies to all judicial controversies between the assignee and any person whose interest is adverse to his, in behalf of the bankrupt's estate, including actions like the one now before the court. (Bailey v. Glover, 21 Wall., 342; Walker v. Towner, 16 B. R., 287.)

138 Creditors, after the failure of the corporation, could have brought a bill in equity against the corporation, and joined the stockholders to enforce the payment, and it is equally clear that the assignee might have sued the moment the title to the estate of the bankrupt was duly conveyed to him as such assignee. (Hall v. Ins. Co., 5 Gill, 484; Henry v. Vermillion, 17 Ohio, 187; Ogilvie v. Ins. Co., 22 How., 380; Adler v. Brick Co., 18 Met., 61; Mann v. Penty, 2 Sand. Ch., 297.) Stockholders, under such circumstances, are debtors to the corporation; consequently, as Chief-Justice Waite held, the claim against them passed to the assignee as part of the property, estate, and credits of the bankrupt. (Terry v. Anderson, 5 Otto, 636.) Since that decision it seems to be a work of supererogation to argue in support of the proposition, as it is established by the highest authority known to our law.

Judgment for the defendants.

139 UNITED STATES OF AMERICA,
*Massachusetts District, ss:*

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachustts, certify that the foregoing is a true copy of the record and of all proceedings in the cause of Gustavus A. Scovill et al., assignees, plaintiffs, v. Nathaniel Thayer, defendant, lately determined in said circuit court, including the opinion of the court in said cause.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Boston, in said district, this sixth day of August, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the one hundred and fourth.

[SEAL.] JOHN G. STETSON, *Clerk.*

140 *Copy.—Bond to party on writ of error.*

Know all men by these presents that we, G. A. Scovill, as principal, H. C. McComas & J. E. McKeighan, of St. Louis, Missouri, and A. A. Ramsey, of Boston, Massachusetts, are held and firmly bound unto Nathaniel Thayer, of Boston, Massachusetts, in the full and just sum of one thousand dollars, to be paid to the said Nathaniel Thayer, his heirs, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated the thirtieth day of May, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas lately, at the October term, 1878, of the circuit court of the

United States for the district of Massachusetts, in a suit depending in said court between G. A. Scovill and T. H. Annable, assignees of the Fort Scott Coal and Mining Company, plaintiff, and the said Nathaniel Thayer, as defendant, judgment was rendered against the said G. A. Scovill and T. H. Annable, and the said G. A. Scovill and T. H. Annable having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Nathaniel Thayer citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said G. A. Scovill and T. H. Annable shall prosecute said writ to effect, and answer costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

G. A. SCOVILL. [L. S.]
H. C. McCOMAS. [L. S.]
J. E. McKEIGHAN. [L. S.]
A. A. RAMSEY. [L. S.]

Signed and delivered in the presence of—

Approved by—

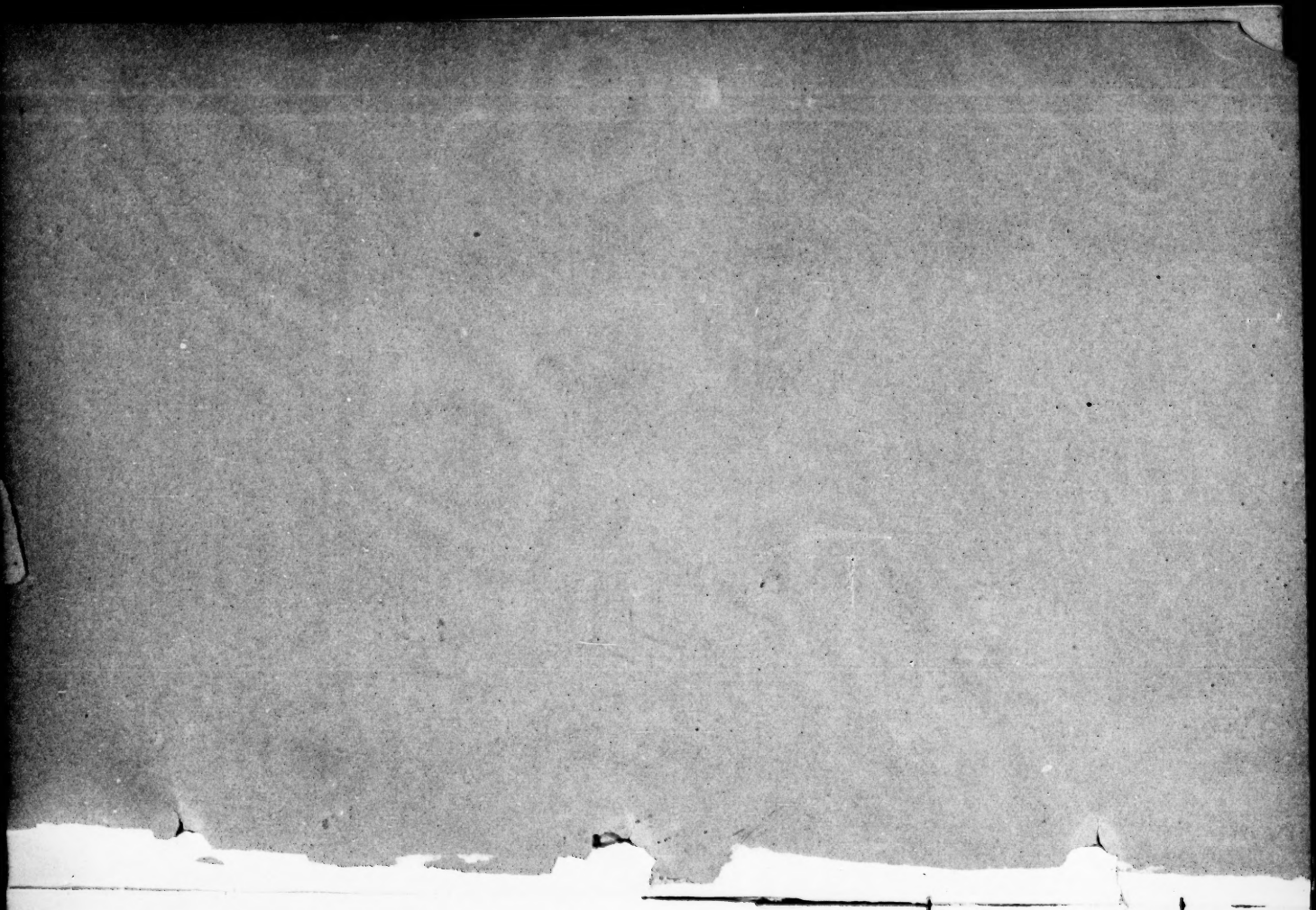
RUSSELL & PALMER.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
*Clerk U. S. C. C., Mass. Dist.*

(Indorsement on cover:) No. 227. G. A. Scovill & Thomas H. Annable, assignees of the F't Scott Coal & Mining Company, plaintiffs in error, vs. Nathaniel Thayer. Massachusetts C. C. U. S. Filed 11th August, 1879.



IN THE

# Supreme Court of the United States.

G. A. SCOVILLE AND THOMAS H. ANNABLE,
ASSIGNEES IN BANKRUPTCY OF THE FORT SCOTT COAL AND MINING COMPANY,
*Plaintiffs in Error,*
*vs.*
NATHANIEL THAYER,
*Defendant in Error.*
} *No. 227.*

ERROR FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

## STATEMENT, POINTS, AND AUTHORITIES FOR PLAINTIFF IN ERROR.

J. E. McKEIGHAN,
*With whom is* A. A. RANNEY,
*For the Plaintiff in Error.*

G. I. JONES & CO., Law Printers, 212 Pine Street.

IN THE

# Supreme Court of the United States.

G. A. SCOVILLE AND THOMAS H. ANNABLE,
ASSIGNEES IN BANKRUPTCY OF THE FORT SCOTT COAL AND MINING COMPANY,
*Plaintiffs in Error,*
*vs.*
NATHANIEL THAYER,
*Defendant in Error.*
} No. 227.

ERROR FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

## STATEMENT.

This was an action *at law*, brought by the plaintiffs as assignees in bankruptcy of the Fort Scott Coal and Mining Company, a corporation organized under the laws of the State of Kansas, against the defendant, a citizen of the State of Massachusetts, to recover of the defendant the sum of $27,160 upon an assessment for unpaid stock made against him as a stockholder of said Coal Company, by the District

Court of the United States for the District of Kansas, on the tenth day of June, 1876.

The writ was issued in court below on the ninth day of April, 1877.

On the fifteenth day of May, 1877, upon the entry of said writ, the plaintiffs filed their declaration.

The declaration in different courts alleged that the bankrupt corporation had been organized under the general laws of the State of Kansas for the purpose of mining, buying and selling coal, and had a capital of $400,000, divided into four thousand shares of $100 each. That by the order and judgment of the District Court of the United States for the District of Kansas it was, on the eleventh day of April, 1874, duly adjudged a bankrupt.

That on the twenty-ninth day of April, A. D. 1874, the said plaintiffs were elected by the creditors assignees of the estate of said company.

That on the fourth day of May, 1874, a deed of assignment was made of all the estate of the said bankrupt to the plaintiffs.

That on the application of the said plaintiffs the said District Court made an assessment and call on each share of stock of said corporation of $76 less any amount paid on the same, and directed the same to be paid to the assignees, on or before the first day of August, 1876, which call and assessment was as follows:

In the District Court of the United States, District of Kansas.

FRIDAY, June 10, A. D. 1876.

Present — The Hon. C. G. Foster, Judge.

In the matter of the Fort Scott Coal and Mining Company, a bankrupt, on petition of its assignees, G. A. Scoville and T. H. Annable, its assignees, for an order and *decree* to assess the stockholders.

The said assignees having heretofore, viz., thirty-first day of March, A. D. 1876, filed their petition in said court, set-

ting forth the condition of its assets, liabilities and resources, with a statement of amount of unpaid stock, names and residences of stockholders, and a rule having been made by said court, on said filing of said petition, requiring said stockholders to show cause why an assessment should not be made according to the prayer of said petition, which said rule was made returnable on the twenty-first day of April, A. D. 1876, and extended to this day, viz., the tenth day of June, 1876, by consent of stockholders and said assignees and the order of this court, the said cause came on for hearing, etc., on the exceptions and objections of stockholder R. S. Watson, appearing for himself and all others desiring to avail themselves of the said exceptions, the said R. S. Watson appearing by his attorneys, S. O. Thatcher and James Grant, and the said assignees by their attorneys, McComas & McKeighan and C. W. Blair; the said exceptions and objections having been argued and submitted to the court, the court, being fully advised, overruled the said exceptions and objections, to which ruling of the court the said stockholders duly excepted, whereupon an amendment, by leave of said court, was filed to said petitions, whereupon said cause came on for trial, on consideration of which, after argument of counsel, the court being now fully advised and informed concerning the same, it appearing that said rule has been served as directed, adjudges and decrees that the material allegations in said petition and amendment thereto are true; that the capital stock of said bankrupt has become, and now is, liable to assessment by this court for the full amount unpaid thereon, for the purpose of paying all claims properly provable in bankruptcy against said bankrupt corporation and the expenses of collecting such assessment and of the bankrupt proceedings, and *that it is now necessary* to make an assessment of $76 on each share of stock to pay the said debts and expenses in the manner prayed for by said assignees. Whereupon, on motion of C. W. Blair and McComas & McKeighan, attorneys of said assignees, it is by the court

further ordered, adjudged and decreed that for the aforesaid purposes a call and assessment be, and the same are hereby made upon the capital stock and stockholders of the Fort Scott Coal and Mining Company of Kansas, the bankrupt herein, of seventy-six per centum of the par value of said stock, being $76 on each and every share thereof, upon which call and assessment shall be credited to each stockholder any amounts paid heretofore by him or his assignees for or on said share, and each and every holder of stock in said company is required to pay the amount hereby assessed when called for, viz., seventy-six dollars on each share, less amount already paid to the said G. A. Scoville and T. H. Annable, the assignees of said bankrupt, at the office of Frederic Scoville, a register in bankruptcy in said court, in the city of Fort Scott, Kansas, on or before the first day of August, A. D. 1876, *and in default of such payment the assignees are directed to sue for and collect the same*, and if the amount realized from the said assessment should prove insufficient for the purpose, the said assignees will report the deficiency for further action thereon. It is further ordered that the said assignees make a call and assessment in accordance herewith, and file the same in this court, within twenty days from date hereof, and that they cause a copy thereof, *and of this decree*, to be served on or mailed to each of said stockholders, directed to him at his usual place of residence, as shown by the book and record of said bankrupt, or as may be known by the said assignees, on or before the twenty-first day of July, A. D. 1876, and such notice shall be sufficient, and the affidavit of said assignees, or one of them, shall be sufficient evidence of the facts therein stated in regard to the same.

(Signed) C. G. FOSTER, *Judge*.

That in pursuance of said decree of said court the assignees, on the first day of July, 1876, made an assessment call on the capital stock of the said company, which was as follows:

United States District Court, Kansas. In the matter of the Fort Scott Coal Mining Company, a bankrupt.

ASSESSMENT OF STOCK.

In pursuance of the order of the court, made herein on the 10th day of June, 1876, and under and by virtue thereof, and of the authority vested in us as assignees in bankruptcy of the Fort Scott Coal and Mining Company, of Kansas, a bankrupt,

We, as such assignees, do hereby make an assessment and call upon the capital stock and stockholders of said corporation, a bankrupt, to the amount of seventy-six per cent of the par value of the stock held by each of such stockholders, upon each share thereof. Upon which call and assessment there shall be credited to each stockholder any amount that may have been paid upon any share of stock held by him.

This assessment is made for the purpose of raising money to pay the debts and liabilities incurred by said corporation and company in the course of its business, and the costs and expenses of the said bankruptcy, and of the proceedings herein, and the collection of this assessment, *and the necessity authorizing and requiring such assessment is now declared to have arisen*, and each of the stockholders of said company of said corporation is hereby ordered and required to pay the amount hereby assessed and called for from him, at the office of Frederick Scoville, in the city of Fort Scott, Kansas, one of the registers in bankruptcy of said court, on or before the first day of August, A. D. 1876.

G. A. SCOVILLE,
T. H. ANNABLE.

FORT SCOTT, Kansas, July 1, 1876.

That afterwards R. S. Watson, one of the stockholders of the company, for himself and others, filed a petition in the Circuit Court of the United States for the District of

Kansas for the review of said order and decree of the said District Court, and on the 29th day of November, A. D. 1876, the said Circuit Court made the following order.

In the Circuit Court of the United States, District of Kansas:

In the matter of the petition of R. S. Watson, for himself and others, to review the assessment of the unpaid stock of the Fort Scott Coal and Mining Company, of Kansas, a bankrupt, made by the United States District Court of Kansas, the tenth day of June, A. D. 1876, on the application of G. A. Scoville and T. H. Annable, assignees of said bankrupt.

Now at this day came the said petitioners, by Grant and Smith, their attorneys, and the said assignees, by their attorneys, McComas & McKeighan and C. W. Blair, whereupon the said court rendered its decision on said petition of review heretofore submitted, by consent of said parties, in vacation to Hon. John F. Dillon, judge of said court, and directed the following order to be made, viz., that the said *order and decree* of assessment of stock sought to be reversed by said petition for review be, and the same is hereby, affirmed in all things, with this modification: that the said District Court enter an order allowing each stockholder of said bankrupt company, who shall pay the amount of said assessment on his stock without suit, in ninety days from this twenty-ninth day of November, A. D. 1876, a credit on his or her proportion of the amount so assessed as was included in said assessment, for the purpose of paying the costs of enforcing by suit the collection of said assessment, the amount to be so credited in conformity with this order, to be ascertained by the said District Court; to which court the matter, together with this order, is hereby remanded.

(Signed) JOHN F. DILLON, *Judge*.

That in conformity to said order of the Circuit Court the said District Court made the following order: —

In the District Court of the United States, District of Kansas:

In the matter of the assessment on unpaid stock of the Fort Scott Coal and Mining Company, a bankrupt, at Topeka, in said district.

Present — Hon. C. G. Foster, judge of said court; J. C. Wilson, Clerk; Charles Miller, Marshal.

DECEMBER 4, A. D. 1876.

Now at this day came on for hearing the application of G. A. Scoville and T. H. Annable, assignees of the said bankrupt, appearing by McComas & McKeighan and C. W. Blair, their attorneys, and it being represented in said application, and shown on the hearing thereof, that R. S. Watson, one of said company's stockholders, appearing for himself and others to resist the assessment on the unpaid stock of said company, made on the tenth day of June, A. D. 1876, subsequent thereto, sought by petition in review, directed to Hon. John F. Dillon, judge of the Circuit Court of the United States for Kansas, to reverse and set aside the said assessment; and it appearing and being shown that the said Hon. John F. Dillon, judge of said court at Topeka, in said district, on the twenty-ninth day of November, A.D. 1876, after hearing the same, affirmed said assessment in all things, with this modification: that this court enter an order allowing a credit on the said unpaid stock, in favor of each stockholder who, in ninety days from the twenty-ninth day of November, A. D. 1876, should pay without suit, the amount chargeable against him or her by virtue of said assessment; said credit to be equal to the amount included in said assessment for the cost and expenses of enforcing by suit said assessment, which amount was directed to be ascertained by this court. Now, then, it being represented and shown by said assignees that not more than ten per cent of the said assessment was included for

said purpose, and that a credit of such amount would be just, it is ordered and directed that there be, and there is hereby, allowed a credit of ten per cent on the amount chargeable to each stockholder, by virtue of said assessment, who shall, in ninety days from the twenty-ninth day of November, A. D. 1876, pay the amount due on said assessment and call, less said credit, according to the terms thereof. The said assignees are directed to send, within thirty days, a copy of this order by mail to the address of said stockholders of said bankrupt, as shown by the books thereof, postage prepaid.

(Signed) C. G. FOSTER, *Judge*.

That notices had been served on said defendant as required by each of said orders and decrees. The declaration charged the defendant with being the owner in the aggregate of 870 shares of the capital stock of said company, on 450 of which he has paid $50 per share; on 135 of which he has paid $40 per share, and on 285 of which he has paid $30 per share. That the said defendant had failed to comply with said *orders and decrees, and had failed to pay the said assessment and call* made upon the stock held by him, therefore said assignees brought said suit. On the 14th day of June, A. D. 1877, the said defendant filed his answer, which was as follows:—

And now comes the defendant, and for answer to the plaintiff's process, says that he denies each and every allegation in the plaintiff's writ and declaration, and in each and every count thereof contained.

And defendant further says that the plaintiffs cannot maintain this action, for the reason that the cause thereof, if any there be, accrued for the said assignees more than two years before this suit was begun.

By his attorneys,

RUSSELL & PUTNAM.

Defendant also filed his declaration in set-off, as follows:—

And defendant says the bankrupt corporation made certain promissory notes, copies of which are hereto annexed, marked "A," "B," "C," "D," and "E," payable to its own order and indorsed by it; and at the time of the filing of the petition upon which said corporation was adjudicated bankrupt, the defendant was, and still is, the holder of said notes, and no part thereof has been paid, and the said bankrupt corporation owes defendant the amount of said notes, with interest, and the defendant claims the right to set off his said notes and interest against any claim the plaintiffs may have against him in this suit.

By his attorneys:

RUSSELL & PUTNAM.

On the 9th of July, 1877, plaintiffs filed their answer to declaration in set-off as follows:

The plaintiffs deny each and every allegation, item, and particular in the defendants' declaration in set-off contained, including each count thereof, the same as if each was specified and denied separately and in its order.

They say, further, that said notes were without consideration, unauthorized, and illegal and void, if ever given by the company as alleged.

They say further, that said claims in set-off are not the subject of a set-off or allowable as such, if ever due in this action.

Further, that the same were and have been proved and allowed against the estate of the corporation in bankruptcy and in question in the United States District Court, sitting in bankruptcy in the district of Kansas.

And they make same answer to all counts in set-off.

By their attorneys:

A. A. RANEY.
C. W. BLAIR.
MCCOMAS & MCKEIGHAN.

On the 10th day of May, 1878, an agreed statement of facts and exhibits thereto annexed was filed. (P. 33 of record.)

The agreed statement, having been made to apply to several cases of the same character, contains much not applicable to the defendant.

The agreement, so far as applicable to the defendant Thayer, was as follows:

## STATEMENT OF FACTS.

The said Fort Scott Coal and Mining Company was duly and legally incorporated under the laws of the State of Kansas on the 25th day of November, 1870, with a capital stock of one hundred thousand ($100,000) dollars, divided into shares of one hundred ($100) dollars each.

On the 19th day of April, 1871, the said stock was increased from one to two hundred thousand dollars.

The said company was adjudged a bankrupt by the District Court of the United States for the District of Kansas, and such proceedings have been had in said court as appear in the certified copies of the records and files of said court and deed of assignment hereto annexed, and made part of this agreement.

The said company kept a journal, ledger, transfer-book, certificate-book, and stock-ledger.

According to said books, it appears that the two additional issues of stock were made by the said corporation, one of one hundred thousand dollars, October 16, 1872; one of a like amount, December 27, 1872; but defendants deny that the corporation did or could, in fact, issue any such additional stock; and claim that such additional issues were *ultra vires* of the corporation, and absolutely null and void.

It is agreed that according to said books the several defendants appear to have held stock as follows. The stock described as of the first two issues being admitted to

be valid, and that described as of the last two issues being denied by the defendants to be of any validity in all cases:

Nathaniel Thayer held and owned at the said date of the said adjudication, and still holds and owns shares of the stock of the said company, as follows: —

Of the first two issues, certificate No. 104, for two hundred and eighty-five shares. On two hundred of these shares *he had paid to the said company thirty dollars per share;* on the remaining eighty-five shares he had paid to the said company forty dollars per share.

Of the third and fourth issues, certificate No. 85, for one hundred and thirty-five other shares of said stock, upon which he had paid to the said company fifty dollars per share.

Also certificate No. 110, for four hundred and fifty other shares of the said stock, upon which he had paid to the said company fifty dollars per share.

It is agreed that the notes set up by certain of said defendants in their several declarations of set-off, filed in said cases, were notes given to them by the said bankrupt prior to said date of adjudication, and were subsisting claims against the said bankrupt at said date; that after the said adjudication, each of the said defendants owning said notes filed and proved the same in said bankrupt court, as is required by law, and the same were allowed as claims against the said bankrupt's estate.

The certificates of stock of each of said defendants herein mentioned were made in accordance with the printed blank certificate hereto attached, marked "J."

No other or further payment was ever made to said company upon the stock held by the said defendants than the payments hereinbefore mentioned; but defendants contend that they are entitled to have their payments on account of the void stock of the third and fourth issues credited to them as paid towards their dues to the corporation, if any, on account of the first and second issues.

The General Statutes of 1868, of Kansas, and of 1872, with reference to corporations, may be referred to.

The stockholders' and directors' proceedings with reference to increase of stock from $200,000 to $300,000 are correctly set forth in copies of same certified to by the Secretary of State (marked C and D). Said certificates are dated respectively the twenty-fourth day of October, A. D. 1872, and the sixth day of January, A. D. 1873.

Certain proxies of certain of the defendants, authorizing certain persons therein named to vote at certain stockholders' meetings therein named, are annexed (marked H). Formal demand was made on each of said defendants by the assignees before suit was brought.

*The said assignees made an assessment and call in pursuance of the order and decree* of the 10th of June, A. D. 1876, of the District Court of the United States for the District of Kansas, and the order extending the time, as shown by papers hereto annexed, marked "F," and they mailed copies thereof and of said order and decree, as directed in the same, and sent copies of the order of said court of December 4th, A. D. 1876, as directed; said copies are hereto annexed.

No assessments or calls were ever made by the said corporation upon the stockholders or stock of said company after the payments hereinbefore set forth.

Certain receipts given to certain of the defendants for payment on account of stock, and surrendered to the company on receipt of the stock, are annexed (marked I).

It is agreed that after the two last increases of stock herein set forth, the said company continued business until about February, A. D. 1874, and incurred debts and liabilities which have not been paid, and which have been proved and allowed in said Bankrupt Court.

It is admitted, as heretofore stated, that the signatures of certain of the defendants, or the deceased persons represented by them, to certain proxies, of which copies are annexed hereto, authorizing certain persons therein named, or

their substitutes, to vote for them at two different meetings of stockholders of said company, viz., the 15th of October, A. D. 1872, and the twenty-fourth day of December, 1872, are genuine, and that the signatures to powers by substitution, which are hereto annexed, of said persons so empowered appointing substitutes, are genuine.

That the call of the company for said meeting of October 15, 1872, was in the following words, and notice thereof was given by publication, as hereinafter stated, viz.:

"STOCKHOLDERS' MEETING.

"A meeting of the stockholders of the Fort Scott Coal and Mining Company will be held at the office of the company, in Fort Scott, Kansas, on Tuesday, October 15, 1872, between the hours of 9 o'clock, A. M., and 4 o'clock, P. M., for the purpose of acting upon the following proposition, submitted by the Board of Directors: 'Shall the capital stock of the company be increased to three hundred thousand dollars?'

"C. O. GODFREY,
"WM. PIERSON,
"EDWARD PRICE,
"JAMES RITCHIE,
"*Directors.*"

Which call was published for three consecutive weeks previous to said meeting, in the Fort Scott *Monitor*, a daily newspaper of general circulation in the neighborhood of its publication, and published at Fort Scott, Kansas, and a copy of the same was sent by mail, three weeks previous to said meeting, to each stockholder of said company, at his usual post-office address.

That said meeting was attended by said persons so authorized to vote, or their substitutes, and said meeting was adjourned to the 16th of October, 1872, when said persons or their substitutes, representing by said proxies a majority of

the stockholders of said company, voted for said increase, which was afterwards made and certified to by the directors, as shown in the proceedings of stockholders and directors heretofore referred to in this stipulation, as certified to by the Secretary of State of Kansas, and marked C.

That the call of said company for said meeting of the 24th of December, A. D. 1872, was in the following words:

"STOCKHOLDERS' MEETING.

"By order of the Board of Directors, a meeting of the stockholders of the Fort Scott Coal and Mining Company is called to meet at the office of the company, in Fort Scott, Kansas, between the hours of 10 A. M. and 4 P. M., on Tuesday, the twenty-fourth day of December, 1872, to vote upon the following proposition, to wit: 'Shall the capital stock of the Fort Scott Coal and Mining Company be increased to $400,000?' and for the further transaction of business.

"EDWARD PRICE,
"WM. PIERSON,
"J. W. JOHNSTON,
"*Directors.*"

Which call was published for three consecutive weeks previous to said meeting, in the Fort Scott *Monitor*, a daily newspaper of general circulation in the neighborhood of its publication, and published at Fort Scott, Kansas, and a copy of the same was sent by mail, three weeks previous to said meeting, to each stockholder, at his usual post-office address.

That said meeting was attended by said persons, or their substitutes so empowered to vote at said meeting, and said meeting was adjourned to the 27th of December, A. D. 1872, when said persons, or their substitutes, representing by said proxies a majority of the stockholders of said company, voted for said increase from three hundred to four hundred thousand dollars, and said increase was made and

certified to by the directors of said company, as set forth in the proceedings of the stockholders and directors heretofore mentioned in this agreement, and certified to by the secretary of the State of Kansas, as marked "D."

That after the said several increases of stock, heretofore mentioned, the defendants, or those under whom they claim, received certificates for the several amounts of the same herein stipulated to be held by them. That after said several increases of stock the managers of said company, at Fort Scott, *kept an advertisement in said newspaper, designating said company as having a capital stock of said several amounts, and printed said amounts as the capital stock of said company on its letter and bill-heads; and said managers and the agents of said company transacting its business in Kansas, represented to different persons and banks, who were solicited to, and did give credit to said company, that its capital stock was four hundred thousand dollars, said persons, banks, and officers thereof believing said statements.*

*That debts so created remain unpaid, and have been proven in said bankrupt court.*

On November 13, 1873, a meeting of the directors of the Fort Scott Coal and Mining Company was held at Fort Scott. There were present C. O. Godfrey, Edward Price, A. W. DeForest, John Hall. Absent, S. W. Phillips.

Resignations of S. W. Phillips and John Hall were received and accepted. J. W. Brooks and Sidney Bartlett were by the board elected to fill the vacancies occasioned by these resignations. The last two named were not present at the meeting.

At this meeting an entire new code of by-laws was submitted and passed, among which was section 12, which was and is in words and figures as follows:

SECTION 12. Assessments of the capital stock may be made by the board of directors, as the requirements of the company may demand. Written notice of such assessments, when made, shall be given to each stockholder,

specifying the amount and time of payment thereof, such notice to be delivered to each stockholder, or sent by mail to his usual post-office address, ten days previous to day of payment; on non-payment of such assessment for thirty days after notice and demand of payment, as aforesaid, the board of directors may declare the stock of such defaulting stockholder forfeited to the use of the company, or take such other action in the premises as may be provided by law.

Said by-laws were directed to be placed on the record-book of the company, and were so placed; but the record of said meeting and of said by-laws was attested on said record-book by the signature of the president alone. Said by-laws were so passed and placed on said book long after said defendants purchased their stock.

Each and all of the transfers of stock set out in the original agreed statement, and in the amendments thereto, were made, as required by the laws of Kansas, on the books of the company, and the transferees were substituted on the books of the company as the holders of the stock.

It is also agreed that by agreement made at the date of the issue of the shares of stocks herein specified, the amounts paid thereon were credited to the purchasers thereof, and the balance unpaid credited by discount to said purchasers, and the certificates, as per copy attached, signed and delivered to said purchasers, and the stock account between the company and the said purchasers with reference to said shares of stock balanced by said discount.

It is understood that this agreement is not to be construed as yielding or conceding any proposition of law desired to be maintained by either side; the defendants, and each of them, insisting as matter of law, that said increases last hereinbefore mentioned were and are absolutely void, and the plaintiffs claiming that such objection cannot, under the facts, be set up.

Every fact in the foregoing statement is admitted subject

to all objections as to relevancy, competency, or materiality.

A. A. RANNEY,
McCOMAS & McKEIGHAN,
*For Plaintiffs.*

RUSSELL & PUTNAM,
*For Defendants.*

BOSTON, MASS., December, 1877.

The said agreed statement proved all the allegations of the declaration hereinbefore stated.

It also appeared from said agreement and exhibits that the defendant by his proxy had voted for the second and third increase of stock, and held 450 shares of it, on which he had paid $50 on each share.

The second and third increase of stock were in all respects formal, but are claimed by defendant to be invalid for want of power to make such increase.

The following provisions of the laws of Kansas, affecting the case at bar:

Section 4, General Statutes 1868, p. 191, is as follows:

SEC. 4. Private corporations may be created by the voluntary association of five or more persons, for the purposes and in the manner mentioned in the following sections of the article.

SEC. 5 classifies the purposes for which private corporations may be formed, among which is mentioned "the transaction of any manufacturing, mining, mechanical, or chemical business."

SEC. 6. A charter must be prepared setting forth, *first*, the name of the corporation; *second*, the purpose for which it is formed; *third*, the place or places where its business is to be transacted; *fourth*, the term for which it is to exist; *fifth*, the number of directors or trustees, and the names and residences of those who are appointed for the first year; and, *sixth*, the amount of its capital stock, if any, and the number of shares into which it is divided.

SEC. 8. The charter of an intended corporation must be subscribed by five or more persons, three of whom at least must be citizens of this State, and must be acknowledged by them before an officer duly authorized to take acknowledgment of deeds.

SEC. 9. Such charter shall thereupon be filed in the office of the Secretary of State, who shall record the same at length in a book to be kept for that purpose, and retain the original on file in his office. A copy of the charter or of the record thereof, duly certified by the Secretary of State, under the great seal of the State, shall be evidence of the creation of the corporation.

SEC. 10. The existence of the corporation shall date from the time of filing the charter, and the certificate of the Secretary of State shall be evidence of the time of such filing.

SEC. 14. Any corporation may increase its capital stock to any amount, not exceeding double the amount of their authorized capital, by a vote of the stockholders, in conformity with the by-laws thereof; and if a majority of the stockholders shall vote for the increase of stock, the same may be increased by the board of directors, trustees, or other business managers of such corporation; and upon such increase of stock being made in accordance with the by-laws, the date and amount of such increase shall be certified to the Secretary of State by the directors or trustees, and from the time such certificate is filed the increase of stock shall become a part of the capital thereof. Such certificate shall be filed and recorded in the same manner as the charter.

SEC. 19. The directors or trustees may adopt by-laws for the government of the corporation, but such by-laws may be altered, changed, or amended by a vote of the stockholders at an election to be ordered for that purpose by the directors or trustees on the written application of a majority of the stockholders or members.

SEC. 27. The stock of any corporation created under this act shall be deemed personal estate, and shall be transferable only on the books of the corporation in such a manner as the by-laws shall prescribe, etc.

SEC. 28. The board of directors or trustees of any corporation may require the subscribers to the capital stock of the corporation to pay the amount by them respectively subscribed, in such manner and in such instalments as may be required by the by-laws.

SEC. 29. If any stockholder shall neglect to pay any instalment as required by the board of directors or trustees, the directors or trustees may declare his stock and all previous payments forfeited to the use of the company; but no stock shall be forfeited until the directors or trustees have caused a notice in writing to be served on him personally, or by depositing the same in the post-office, properly directed to him at the post-office nearest his usual place of residence, stating that he is required to make such payment at the time and place specified in such notice, and that if he fails to make the same, his stock and all previous payments thereon will be forfeited to the use of the company; which notice may be served as aforesaid at least thirty days previous to the day on which such payment is required to be made.

**The act of March 1, 1872, amends, among other sections, section 4, hereinbefore referred to, so as to make it read as follows:**

SEC. 4. Private corporations may be created by the voluntary association of five or more persons, for the purpose and in the manner mentioned in the following sections of this article and amendments thereto. Every member or stockholder in said corporation shall vote in person or by proxy.

On the 28th of May, 1878, the cause was submitted to the court, together with the case against Shaw, Executors, etc., on the pleadings and agreed statement, and on the 9th day of October the opinion of the court was had, by the Hon. Nathan Clifford, and judgment rendered for the defendant.

The opinion of the court, applicable to both cases (record, pages 81, 82 and 83), was as follows: —

Circuit Court of the United States, District of Massachusetts.

GUSTAVUS A. SCOVILLE ET AL., Assignees,
*v.*
LEMUEL SHAW ET AL., Executors.
} *No. 1001,* Law Docket.

Before Clifford and Lowell, J J.

Opinion of the court, October 9, 1878, Clifford, J.: —

Assignees in bankruptcy are appointed by the creditors of the bankrupt, and the provision is that as soon as the assignee is appointed and qualified, the judge, or, when there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, and that such assignment shall relate back to the commencement of the proceedings in bankruptcy (14 Stats. at Large, 522). Circuit Courts have concurrent jurisdiction with the District Courts of the same district of all suits at law or in equity which may be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such

person against such assignee touching any property or rights of property of said bankrupt, transferable to or vested in such assignee, but the same section provides that no suit at law shall, in any case, be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee. (*1 Id.*, 518.) Certain other cases of like character are also described in the transcript as pending in the same court, but it is stated in the agreed statement that the case above mentioned is submitted to the court upon the statement of facts signed by the attorneys of the parties.

Sufficient appears to show that the complainants are the assignees in bankruptcy of the Coal and Mining Company, which was incorporated November 25th, 1870, and was adjudged bankrupt April 11th, 1874, as appears by the record of the bankrupt proceedings. On the other hand, it appears that the respondents are the executors of Samuel Hooper, who died February 14, 1875, and that they were duly appointed as such executors on the 15th of March, in the same year; that the Coal and Mining Company was incorporated with a capital of one hundred thousand dollars, divided into shares of one hundred dollars each; that on the 19th of April of the next year the capital stock was increased from one to two hundred thousand dollars. Two additional issues of stock were made by the corporation: one October 16, 1872, of one hundred thousand dollars; the other, December 27, in the same year, of a like amount. But the respondents deny that the corporation had any powers to issue any such additional stock, and claim that the certificates are *ultra vires*, and absolutely null and void. It is agreed that the testator, at the time the company was adjudged bankrupt, then being in full life, held one hundred and fifty shares of the first two issues, upon which

he had paid to the company forty dollars per share; that he also held of the third issue, on which he had paid to the company fifty dollars per share. Proxies were executed by him September 24, 1872, and December 21, in the same year. By the terms of the first proxy he authorized the person therein named to vote at a meeting of the stockholders to be held at the office of the company at the time therein mentioned, but there is no evidence that the person named attended the meeting or gave any vote. Whether he voted for the third issue of the stock, therefore, does not appear; but it does appear that he held at the same time mentioned, seventy-five shares of the additional stock created at that meeting. None of the stock constituting the fourth issue was held by the decedent, but it appears that his proxy gave two hundred and twenty-five votes for the increase authorized, at the meeting which increased the stock to four hundred thousand dollars.

Taken as a whole, the complainants insist that the evidence contained in the agreed statement is sufficient to show that the testator of the respondent was and is estopped to set up the defence that the last issue of the stock was without authority and invalid.

Difficulty would attend the solution of that question, but the court is of opinion that it is not necessary to decide the question, for the reason given in Foreman *v.* Bigelow, that the claim is barred by the Statute of Limitations. Authorities referred to in that case will not, with one or two exceptions, be reproduced, nor will the reasons there given in support of the conclusion be repeated. Suffice it to say that it is now settled that the Statute of Limitations is as applicable in the national as in the State courts (Brown *v.* Heath, 15 Wall., 183; Ross *v.* Jones, 22 Wall., 576), and that the section of the bankrupt act referred to applies to all judicial controversies between the assignee and any person whose interest is adverse to his, in behalf of the bankrupt estate, including actions like the one now before the court.

(Bailey *v.* Glover, 21 Wall., 342; Walker *v.* Towner, 16 B. R., 787.)

Creditors, after the failure of the corporation, could have brought a bill in equity against the corporation, and joined the stockholders to enforce the payment, and it is equally clear that the assignee might have sued the moment the title to the estate of the bankrupt was duly conveyed to him as such assignee. (Hall *v.* Ins. Co., 5 Gill, 484; Henry *v.* Vermilion, 17 Ohio, 187; Ogilvie *v.* Ins. Co., 22 How., 380; Ador *v.* Brick Co., 13 Mo., 61; Mann *v.* Penty, 2 Sandf. Ch. 297.) Stockholders under such circumstances are debtors to the corporation; consequently, as Chief Justice Waite held, the claim against them passed to the assignee as part of the property, estate, and credits of the bankrupt. (Terry *v.* Anderson, 5 Otto, 636.) Since that decision it seems to be a work of supererogation to argue in support of the proposition, as it is established by the highest authority known to our law.

Judgment for the defendants.

The case of Foreman *v.* Bigelow, referred to by the court as furnishing the grounds of its decision in the case at bar, was *a suit in equity*, brought by Foreman, assignee of the Central Coal and Mining Company of Missouri, against this defendant and others, as stockholders, to recover the difference between the par value of the stock held by the defendants and the true value of the property accepted by the corporation in full payment of the stock.

The defendants demurred, on two grounds:

1. That the bill did not make a case which entitled the plaintiff to recover.

2. That the cause of action accrued to the assignee more than two years before the beginning of the suit.

The case is reported in Vol. 7, p. 430, Central Law Journal. The court devotes nearly the whole of its opinion to the first ground of demurrer, and held it good.

That portion of the opinion referring to Statute of Limitation, is as follows: "Nothing is alleged in the bill of

complaint tending to show that the respondents were participants in the fraud, or that they had notice of the transaction, or knowledge of any facts or circumstances tending to put them on inquiry; and if there were any such matters alleged in the bill of complaint, it could not benefit the complainant, as it is settled law that in such a case the cause of action arose in favor of the complainant when the estate of the bankrupt corporation vested in him as the assignee in bankruptcy.

When the charter of a bank contained a provision binding the individual property of its stockholders for the ultimate redemption of its bills, in proportion to the number of shares held by the stockholders respectively, the Supreme Court held, that the liability of a stockholder arose when the bank refused or ceased to redeem, and became notoriously insolvent. Terry *v.* Tubman, 2 Otto, 156. Just the same question, with others, was presented to the Supreme Court in a subsequent case, in which the court held, the Chief Justice giving the opinion, that the liability of the stockholders upon their unpaid subscriptions is that of debtors to the bank, and that all such balances passed to the assignee under the assignment, which, by the bankrupt act, is "of all the property, estate, credits, and assets of the bankrupt, whether a corporation or an individual," and, for all that is shown in the record, the stockholders were liable to suit at any time for the recovery of the balance due from them, as such stockholders. Terry *v.* Anderson, 5 Otto, 632; Kennedy *v.* Gibson, 8 Wall. 505; Com. *v.* Bank, 3 Allen, 42; Baker *v.* Bank, 9 Met., 182. Apply that rule to the case before the court, and it follows that even if the bill of complaint had charged that the respondents had notice of the fraud, or were put upon inquiry in that regard, it would not have benefited the complainant, as in that event his claim would have been barred by the two years' limitation of the bankrupt act. Bailey *v.* Glover, 21 Wall., 342. Purchasers of stock, where it appears upon its face that it was only partially paid up,

may be held liable to pay all the unpaid instalments, but the authorities to that effect have no application in this case. Webster *v.* Upton, 1 Otto, 65; 3 Cent. Law Journal, 402; Upton *v.* Hansbrough, 3 Biss., 427.

Adjudged cases in which it has been held that creditors or assignees in bankruptcy may enforce such payments, when the corporation would be estopped to do so, are suits against original subscribers or transferrers, implicated some way in the fraudulent transaction. Upton *v.* Nibilcock, 1 Otto, 45; 2 Cent. L. J., 784. Failure to use due diligence when put upon inquiry was the ground of the decision in that case. Oakes *v.* Funquand, L. R. 2 H. L., 325. Whatever remedy for the fraud the assignee had, it is evident he might have pursued at any time he acquired title to the bankrupt's estate. Ex parte Currie, 7 L. T. (N. S.) 486; Carling's Case, L. R. 1 Ch. Div., 124; Alison's Case, L. R. 9 Ch. App., 6; De Ruvigne's Case, L. R. 5 Ch. Div., 323. This case did not involve the question of the value of property accepted by the corporation or full payment of the stock, and was decided in favor of the defendant solely on the ground that the right of action accrued to the assignees more than two years before the suit was brought.

ASSIGNMENT OF ERRORS.

1. The court below erred in holding that the Statute of Limitations of the bankrupt act had any application to the trust fund sought to be recovered in this action.

2. The court below erred in holding that the right of action sued on accrued to the assignees more than two years before the institution of the suit.

3. The court below erred in holding that the said Statute of Limitations has any application to this case.

4. The court erred in rendering judgment for the defendant. Judgment should have been in favor of the plaintiffs.

I.

The suit was brought in the court below to collect a portion of a trust-fund, and the Statute of Limitations did not begin to run until the defendant had been called on to respond to the obligations of the trust and had disavowed the trust.

That the capital stock of a corporation is a trust-fund publicly pledged to all who deal with it for the payment of its debts is well settled by all courts, and particularly by this court, beginning with the case of Ogilville *v.* Insurance Co., 22 How. 387, and ending with the case of Morgan County *v.* Allen, 103 U. S. 498.

The language of the court in every case, both in asserting the principle as a general one and in applying it to particular facts and circumstances, has been forcible and almost vehement. It is a trust, says the court, to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a *sacred* one, and cannot be disregarded; its violation will not be undertaken by an honest man, and *will not be permitted by the courts.*

Upton, Assignee, *v.* Tribilcock, 1 Otto, 47.

The capital stock is a substitute for the personal liability, which subsists in private partnership.

Sanger *v.* Upton, Assignee, 1 Otto, 56.

A corporation cannot *give* away its stock and issue paid-up certificates. Such action is *ultra vires*, at least to those who deal with the corporation.

Green's Ultra Vires, p. 142;
Sawyer *v.* Hoag, 17 Wall. 610;
Trickerman *v.* Brown, 33 N. Y. 297;
Ogilville *v.* Insurance Co., 22 How. 380;
Osgood *v.* Lattin, 3 Keyes, 521.

In 13 Otto, 498, County of Morgan *v.* Allen, the county had subscribed to the capital stock of a railroad company, and issued its bonds in payment for the stock. Litigation having arisen with respect to the bonds, the county, *by an arrangement between it and the railroad company*, was *released* by *the payment of a less sum than the par value of the stock*. The validity of this release was the subject of controversy in the case cited. The release was held inoperative.

The court reiterates its decision in Sawyer *v.* Hoag, 17 Wall., that "the capital stock of a corporation, *especially its unpaid* subscriptions, constitutes a trust-fund for the benefit of creditors; and its governing officers cannot, by *agreement or other* transaction with the stockholder, release him from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing and for a valuable consideration.

"These principles (p. 509) condemn the arrangements with certain creditors of the company through which the county, to the prejudice of other creditors, attempted to discharge its liability to the common debtor by paying less than the entire sum due from it."

In the case cited of Ogilville *v.* Knox Insurance Company, the court says (p. 388):

"The ninety per cent *retained by the stockholders* is as much a part of the capital pledged as the cash actually paid in."

So here, the seventy per cent retained as to some of the stock, the sixty per cent as to another portion, and the fifty per cent as to the remainder, by the defendant, "is as much a part of the capital stock," publicly pledged as a trust-fund for the payment of the debts of the corporation, as the thirty, forty, and fifty per cent which he paid to the corporation.

The fact that the defendant, in common with the other stockholders, did not subscribe any instrument in which

he expressly agreed to pay for the stock its par value, is of no consequence.

In Webster *v.* Upton, Assignee, 1 Otto, 65, this question was directly before the court. The defendant in that case insisted that, inasmuch as he merely *held* the stock and had not by any *express* contract agreed to pay the unpaid portion of the stock, he was not bound to pay the call which was made on him. The court says (p. 66): "The capital stock of an insurance company, like that of any other business corporation, is a trust-fund for the protection of its creditors or those who deal with it. Neither the stockholders, nor their agents the directors, can rightfully withhold *any portion* of the stock from the reach of those who have a lawful claim against the company; and the stock thus held in trust is the whole stock, *not merely that percentage of it which has been called in and paid.* This has been decided so often that it has become a familiar doctrine. But what is it worth if there is no legal liability resting on the stockholders to pay the unpaid portion of their shares, unless they have expressly promised to pay it.

"Stockholders become such in several ways — either by original subscription, or by assignment of prior holders, *or by direct purchase of the company.* An express promise is almost unknown except in the case of an original subscription; *and oftener than otherwise it is not made in that. The subscriber merely agrees to take stock. He does not expressly promise to pay for it.* Practically, then, unless the ownership of such stock carries with it *the legal duty of paying all legitimate calls* made during the continuance of the ownership, the fund held in trust for creditors is only that portion of each share which was paid prior to the organization of the company, in many cases not more that five per cent. Then the company commences business, and incurs obligations, representing all the while to those who deal with it, that its capital is the amount of stock taken, when in truth the fund which is held in trust for creditors is only that part of the stock which has actually been paid in. *This cannot be.* If

it is, very many corporations make fraudulent representations daily to those who give them credit." Neither can the defendant escape from these salutary principles by reason of the fact that when he became the owner the stock was by agreement credited, "*by discount*," with the unpaid portion, and the stock account balanced and a certificate issued to him, which was silent as to whether the stock was fully paid or not.

Such an arrangement was a nullity, for two reasons:

First, it was, as is decided in the authorities cited, *ultra vires* of the corporation.

The directors or agents of the corporation had no power to make such a gift. The doctrine of estoppel can have no application to such a case, even against the corporation. There are cases in which third parties would be prejudiced by an *ultra vires* contract, and the company has enjoyed the benefits of the contract, that the corporation would be estopped from pleading want of power, but this is not one of them. Such an arrangement is as much a nullity as if the defendant had not paid anything, and the *whole* of his stock account had been balanced by a "discount." It has been very forcibly said, in one of the cases cited, that "the capital stock of a corporation cannot be made a football of."

2d. Such an arrangement was void as a *fraud* upon the creditors of the corporation.

This fund, so religiously guarded by the courts as to merit and attain the appellation of a "sacred trust," cannot be dissipated by a mere trick of book-keeping.

The stockholders of this corporation have in their ranks men eminent as capitalists, physicians and lawyers, but their united wit and ingenuity falls far short of making a "discount" a payment. The law calls it a fraud, and as a fraud it must be treated.

The arrangement referred to being void as to the corporation for want of power, and void as to the creditors because a fraud upon them, we think we are justified in saying that

this case will be considered and decided as though no such entry had been made in the books.

Is the capital stock an express or an implied trust? From the decisions cited it cannot be considered in any other light than as an *express* trust, a fund "*expressly* and *publicly* pledged" to the payment of the debts of the corporation. This is the language of the decisions.

In 3 Swan's R. 585, Lord Nottingham defined an express trust, as a "trust raised or created by the acts of the parties which are declared either by word or writing, and these declarations are established either by *direct and manifest proof or violent and necessary* presumption."

An implied trust is where a court of equity, in the interest of right and justice, and to prevent fraud against the will of the party affected, declares a trust with respect to property which otherwise would not be trust property. The common instance is where A, entrusted by B with money to purchase land, takes the title fraudulently in his own name. A court of equity declares a trust and forces a conveyance. There is nothing in the land which makes it trust property, but there is in the conduct of the party. But in the case of capital stock, the stock *itself* is trust property, and always continues to be so. Not because a court of equity declares it is against the will of the corporators, but because it is both in *law and equity* a trust-fund, so intended by the law and the corporators.

It is a well-established incident of *express* trusts that statutes of limitations do not run against them until the trustee is *called* on to perform the trust and he *refuses* or *disavows* the trust.

Ballantine on Limitations; 6 Wheat, 481, Prevost *v.* Gratz, 369. In 23 Mississippi, 88, Payne *v.* Bullard, this question was discussed and decided against the plea of a Statute of Limitations.

The plaintiff in that action was a judgment creditor of an insolvent bank, and filed a bill against the defendant, a stockholder, to subject the unpaid portion of his stock to

the payment of the judgment. The defendant interposed a plea of the Statute of Limitations. The court said: "The trust-fund is usually administered by the directory, as the agents of the stockholders, and, after the payment of the stock, the directory is looked to for its faithful management; but *before* its payment the *stockholders themselves* are chargeable with the trust in favor of the creditors of the bank. The stock is the fund which the creditors trust. They have no direct means of compelling its payment until they have judgments at law. They become the beneficiaries of the trust by receiving the notes, and the stockholders, as the persons bound by the trust, *cannot oppose the Statute of Limitations* to have the stock paid up. If the corporation does not compel payment of the stock, the subscribers must be deemed to hold it for the corporation, *subject to its call. It is a continuing and subsisting trust and confidence, to which the Statute of Limitations has no application.*"

So here, the retention of the unpaid portion of the stock by the defendant must be regarded as a "continuing and subsisting trust and confidence," to which the bankrupt Statute of Limitations, or any other similar statute, could have no application until the corporation, or the creditors, or the assignees, called upon him to perform the trust, which in this case was not before call and assesment was made, and he declined to respond to it.

II.

Conceding, for the purposes of this branch of the case, that a general statute of limitation might apply to a trust-fund such as is sought to be reached in this action, and that the particular statute interposed as a bar by the defendant is applicable to such an action, the question remains, *When did the right of action sued on accrue to the plaintiffs?*

The statute of limitations set up by the defendant in his

answer is found in section 5057 of the Revised Statutes, passed at the session of Congress of 1873–74, and is as follows:

SEC. 5057. No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time *when the cause of action accrued for or against such assignee*, and this provision shall not, in any case, revive a right of action barred at the time when an assignee is appointed.

The sections of the General Statutes of Kansas entering into the consideration of this question are found in statement, and are as follows:

Sec. 19 gives the power to the directors to adopt by-laws.

SEC. 28. The board of directors or trustees of any corporation may require the subscribers to the capital stock of the corporation to pay the amount by them respectively subscribed, in such manner and in such instalments as may be required by the laws.

On November 13th, 1873, several months before the adjudication in bankruptcy, an entire new code of laws was passed by the board of directors (p. 41 of the record), among which was the following:

SEC. 12. Assessments of capital stock may be made by the board of directors, *as the requirements of the company may demand*. Written notice of such assessments, when made, shall be given to each stockholder, specifying the amount and time of payment thereof, such notice to be delivered to each stockholder, or sent by mail to his usual post-office address, ten days previous to payment. On non-payment of such assessment for thirty days after notice and demand of payment as aforesaid, the board of directors may declare the stock of such defaulting stockholder forfeited to the use of the company, or take such other action in the premises as may be provided by law.

1st. It is plain enough that under the laws of Kansas, and this by-law of the company, the corporation could have had no right of action against any stockholder at law (or even in a court of equity) until the board of directors had made an assessment on the unpaid stock, and the stock-

holder had defaulted in its payment; and the statute of limitations of the jurisdiction, where suit might be brought for failure to pay the assessment, would not begin to run until the time given for its payment had expired.

18 Ohio St. 396, Gibson *v.* Columbia & N. R. T., etc., Co.;
117 Mass. 359, Bisilow *v.* Sibly;
3 Pa. St. 20, Sinkler *v.* Turnpike Co.

The right of the company to collect the unpaid stock was qualified, by the law of the State and the by-law of the corporation, to making a call fixing the time of payment, and *upon failure to pay as required*, to sue upon such call; and until a call was made no right of action or cause *of action* accrued to the company.

It is not necessary, in this action, to argue whether or not the bankrupt corporation *itself* could have made assessments on the unpaid stock represented by "a discount" on the books of the company. We think it could, because that arrangement was not only *void* as against creditors, but it was *ultra vires* of the corporation itself. (See Green's Ultra Vires, 142.) If the directors could not make such a release, or *give* to the stockholders the unpaid stock, then they might have required it to be paid in under calls made upon them. There being no express contract to pay, the law would have raised an implied contract to pay the calls made for the requirements of the corporation, *unaffected in the slightest manner by the void gift or discount.*

We do not see how the stockholders could have escaped such a demand made upon them, certainly on no principles of *estoppel* found in the books. The whole ground-work of the doctrine of *estoppel* is to protect the innocent. In such a case the stockholder *knows*, or the law says he does, which is still stronger, as well as the corporation does, that the law does not permit such a gift. He is in no better position than if he had taken the stock, paid a part on it,

and left the rest unpaid, to be called for by the company as necessity might require. The District Court had the power and authority to make the assessment in question.

In Sanger *v.* Upton, Assignee, 1 Otto, p. 59, the court says: "It was competent for the court to order payment of the stock, as the directors under the instruction of a majority of the stockholders might, before the decree in bankruptcy, have done. The former is as effectual as the latter would have been. It *may*, perhaps, *be well doubted whether the stockholders would have imposed such a burthen upon themselves. The law does not permit the rights of creditors to be subjected to such a test.* It would be contrary to the plainest principles of reason and justice to make payment by the debtor for such a purpose in anywise dependent upon his own choice."

In Kansas, the action of the directors alone is sufficient to make a call on stockholders.

If by any kind of sound reasoning it could be held that the corporation in question could not have made assessments on the unpaid stock and recovered them in case of failure to pay, then the assignees of the corporation, as the representatives of the creditors, could obtain from the court having jurisdiction, *an assessment*, or the authority to make one or both (both of which was done in this instance), which the corporation could not have made. By all the authorities such a gift was a fraud upon creditors, and void.

The assignees of a bankrupt corporation do not represent the stockholders for the purpose of settling equities between them. If upon taking an inventory of the property it had appeared that there were sufficient assets to pay the debts of the company, it would have been the duty of the court to have denied any application they might have made for a call on the stockholders, because not *required or necessary*.

The assignees representing the creditors should not and

~~may~~ not recover from the stockholders more than is necessary to make up the deficiencies between assets and liabilities; and this had to be ascertained and declared by the District Court.

13 Wis., Adler *v.* Milwaukee Patent Brick Co.;
11 N. B. R., 411, Myers, Assignee, *v.* Seely.

It is for the District Court having in charge the bankrupt's estate, to determine what the deficiency is, or probably will be, and to make and direct an assessment accordingly, which is conclusive as to its necessity and amount. *In an action at law* this assessment is absolutely essential, and the assignees cannot sue *until* it is made.

42 Iowa, 99, Chandler, Receiver, *v.* Keith:
2 Dillon, 428, Payson *v.* Stoner.

So in Chandler *v.* Liddle, 1 Central Law Journal, the Circuit Court of the United States District of Iowa, Justice Miller sustained a demurrer to the petition and dismissed the action on the ground that, being an action *at law*, an assessment was necessary, and without it no action could be maintained.

In the court below, defendant's counsel claimed that the "cause of action" was the unpaid stock, and that it "accrued" or passed to the assignee by the deed of assignment. The same reasoning would bar a promissory note not due when the assignees were appointed. The note is the cause of action, and it accrued or passed to the assignees by the deed of assignment; but the assignees had no right to sue upon it until the time fixed for payment had arrived and the maker had failed to pay. We take it that the words "cause of action," as used in the Statute of Limitations relied on by defendant, must be held to apply to the time elapsing after the assignees might rightfully have brought the action, and not to the time elapsing after the *ownership* of the cause of action.

The unpaid stock furnished the primary ground of the action, but it was the *failure to pay the assessment* made upon it, which gave the assignees a cause of action in court. It has not been claimed, and we think will not be, that the action in the court below was not proper in form, and in form and in substance it is *an action at law on the decree and assessment, and the failure of the defendant to pay the same.* The unpaid stock was the ground of the assessment; it justified it, but it was the call and failure to pay which gave the assignees the right to bring the suit. If the defendant had paid the assessment, the assignee would have had *no cause of action*, notwithstanding there still remains unpaid an additional portion of the stock. If the assigneess had brought suit on the assessment *before* the time given to the defendant to pay it, they would have been cast in the suit as upon an action prematurely brought; and yet, according to the defendant's theory, the Statute of Limitations was running against them all the time; so that, according to this theory, if the assignees had applied for an assessment on the very day of their appointment, and the court had continued the application to see how the assets would turn out, or for no reason at all, either of its own motion or the motion of the stockholders, and the continuances used up the two years, or if, together with the time fixed for the payment of the assignees, the two years were consumed, the stockholders would have escaped simply by pleading the statute.

Indeed, in this very case such delays might very properly have happened. When the assignees were appointed the affairs of the company were in a very complicated condition. A great many claims were presented for allowance against the estate for breach of contracts. Many fraudulent claims were presented for large amounts, which were defended and beaten by the plaintiffs, and it was not known what could be realized from the assets of the company. The assets were uncertain; the liabilities still more so. If the assignees had applied at once for an assessment, the court, on its own

motion, might very properly have continued it until more could be known of the necessities of a call and its amount, and, with still more propriety and force, could the stockholders have asked for a postponement.

2. The court below sustained the plea of the defendant entirely on the ground that the assignees could, like the creditors of the corporation, have brought a bill in equity against the stockholders the moment the title to the estate was conveyed to him. "Stockholders (says the court in its opinion) under such circumstances are debtors of the corporation; consequently, as Chief Justice Waite held, the claim against them passed to the assignee as part of the property, estate, and credits of the bankrupt." All this may be conceded and our position remain unaffected, that an assessment and failure to pay it within the time specified were necessary to give the assignees a right of action at law.

It is true that the unpaid stock passed to the assignee, and so did the notes of the corporation, but the notes did not become payable at once by virtue of such change of title. The makers became the "*debtors*" of the assignees, as the legal representatives of the corporation, but the assignees could not sue on the notes until they became due and were not paid.

So without injury to our position it might be granted that the assignees could at once have filed a bill in equity against the stockholders, and asked for that an account be taken of the stock held by each defendant, the amount unpaid thereon, the debts and assets of the corporation, and that a decree be made against them for a sum sufficient to make up the deficiency. And it may be, as argued by defendant's counsel, that the court would have continued such action until the administration in the court of bankruptcy had proceeded far enough to have it know what the condition of the estate was and what amount would be required from the stockholders.

But if all this was true, and we do not care to deny it, it certainly is not true that this was the *only* course open

to the assignees. The assignees, according to the decisions of this court, might ask the court having in charge the estate of the bankrupt to make an assessment fixing the amount and time of payment of same, and, if not paid, bring suit thereon. This is what they did do, and they were induced to adopt this course by the language of this court favoring that mode of proceeding.

In Sanger *v.* Upton, 1 Otto, p. 62 of the opinion, the court says: "The assignee might have filed a bill in equity against all the delinquent stockholders jointly. But if the company is utterly insolvent, in any event, *a separate action at law* in each case is much to be preferred. It is cheaper, more speedy and more effectual."

In an action at law the assignees could not sue except upon an assessment made by the court. On the 31st of March, 1875, *and within two years after their appointment*, they filed their petition in the court having jurisdiction, setting forth the causes which had delayed the application. (p. 54 to 57 of record), set out the condition of the estate, and asked that the court make and authorize an assessment on the unpaid stock. The petition gave the names and residences of stockholders. A rule was entered that the stockholders show cause, on or before the 21st day of April next, why an assessment should not be made, which rule was served, as directed by the court, which still was within the two years. The hearing was continued "by consent of the stockholders, and said assignees and *the order of the court*," to the tenth day of June, 1876, *beyond the two years*, at which time the petition and objection of one Watson, a stockholder, appearing for himself and others, were heard, and the assessment made *which gave* the stockholders until the first day of August, 1876, to pay it.

Watson filed a petition for review in the Circuit Court, and the assessment was modified in favor of such stockholders as would pay it within ninety days from the twenty-ninth day of November, 1876. So that by the action of

the court and the assistance of the stockholders themselves to the assessment, nearly one whole year was consumed from the time of filing the application until the assignees could bring an action at law on the assessment. The assignees began their *proceedings* against the stockholders *within* the two years, but could not bring this suit on the assessment any sooner than they did. And if they had begun sooner to obtain the call which was made, the same or other causes would in all probability have resulted in like manner, and without any fault of the assignees.

To construe the Statute of Limitations of two years as meaning what is claimed by the defendant's counsel, under such circumstances, is to do violence to plain, common sense and natural justice. Is it not more natural and logical, and more in harmony with the facts and the form of the action, to say that the assignees had no right to *bring this suit*, until the time had expired given by the court for the payment of the call which is sued for?

3. The assessment decree made by the District Court of Kansas has greater dignity than a mere assessment made against a corporation through the corporate authorities. Such an assessment partakes both of the nature of a corporate assessment and a judicial order, decree, or judgment of a court having jurisdiction of the subject matter and the parties in interest.

The court, in Sanger *v.* Upton, Assignee, p. 58 of the opinion, says: "The order was conclusive as to the right of the assignee to bring the suit. *Jurisdiction* was given to the District Court by the bankrupt act (Rev. Stat., sec. 4972) to make it. It was not necessary that the stockholders should be before the court when it was made, any more than they should have been there when the decree in bankruptcy was pronounced. That decree gave the court jurisdiction and authority to make the order. The plaintiff in error could not in this action question the validity of the decree, *and for the same reason* she could not draw in question the validity of the order. She could not be heard to

question either, except by a separate and direct proceeding had for that purpose. She might have applied to the District Court to revoke or modify the order. Had she done so, she would be entitled to be heard, but it does not appear that any such application was made. As a stockholder, she was an *integral part of the corporation. In the view of the law, she was before the court in all the proceedings touching the body of which she was a member.* In point of fact, stockholders in such cases can hardly be ignorant of the measures taken to reach the effects of the corporation. If they choose to rest supine until cases against them like this are on trial, they must take the consequences. Not having spoken before, they cannot be permitted to speak then, especially to make an objection which looks rather to the embarrassment and delay than to the right and justice of the case."

It must be observed that the court gives such an order all the qualities of a judgment, so far as it undertakes to go, and bases it on the principle that the court has *jurisdiction* over the stockholders for that purpose. It is *conclusive* and *final* within its sphere. The action is based upon it as the order and judgment of a court of competent jurisdiction. The only things left open in each case are whether any particular person sued upon it is in fact a stockholder, and the amount due on his stock. The rest is *res adjudicata* in the judgment sued on, which is a judgment determining the financial condition of the corporation, and the necessity for a call on the stockholders. In other words, it is a final judgment against the stockholders as an entire body or class.

In this case more was done than required under the principles enunciated by this court. A rule was made on the stockholders to appear and show cause why an assessment should not be made. A list of the stockholders accompanied the application, with the residences of each, amount of stock held by each, and the aggregate amounts unpaid by each. By order of the court, the rule was served on

each of the stockholders, and on the day set for its hearing they appeared, and its hearing was continued to June 10th, at which time one Watson filed objections in behalf of himself and other stockholders, which were considered and overruled. Afterwards, the same stockholder, in the same capacity and manner (p. 67 of record), filed a petition for review, which was heard, and the assessment modified.

The court even did more than required. It made the assessment in such form that it would work out equality between the stockholders. That is, seventy-six dollars were called for on each share, less amounts already paid on same. Under such circumstances it may properly be said that there was nothing left to try against any stockholder so notified, except to produce the record of the proceedings in the District Court, as each stockholder was individually and directly brought before the court. Such a judgment should have the same effect as if the assignees had found the stockholders in Kansas, filed a bill in equity against them, and obtained a decree against them. It is well settled in the United States, although it is not so in England, that an *action at law* can be maintained on a decree in a court of equity.

16 How. 65, Pennington *v.* Gibson;
24 How. 203, Nations *v.* Johnson.

It is clear that if the assignees, after having obtained such a decree, had sued at law upon it in the State of Massachusetts within two years after it had been entered, the plea of the Statute of Limitations would not have been well taken, although the bill of equity may have been pending for more than two years before the decree was entered. In New York it is held that an action may be maintained at law on a decree in a surrogate court.

6 Cowen, 493, Dubois *v.* Dubois.

There is an analogy between such a court and a district

court sitting as a court of bankruptcy. Actions brought on judgments of courts of limited or statutory jurisdiction, though they are not courts of record, are not barred, except by the lapse of the statutory time *after* rendition of judgment.

22 Pick. 430, Smith *v.* Momson.

4. But this suit may and should be regarded as a *continuation* of the proceedings for an assessment begun within two years after the appointment of the assignees. This suit is the *complement* of that, rendered necessary by the refusal and failure of the defendant to perform the judgment of the court having jurisdiction over him, and power and authority to make the demand and authorize the demand which was made. The District Court took an account of the condition of the bankrupt, the amount of the stock unpaid, and called in what was necessary to pay the debts of the corporation. In doing this, it did what a court of equity on a bill filed would have done, and, like such a court, it decreed it to be paid. It could not issue an execution on its decree or order to reach the property of the defendant in the State of Massachusetts (neither could any other court in that State); hence this suit was necessary to carry into practical effect the judgment or order of that court. But the proceedings in the District Court were *adversary* in their character; they could have been and were *resisted* in that court; *they were begun in proper time;* they advised the defendant of the claim made upon him on account of his unpaid stock; they were begun in a court having jurisdiction over the subject-matter of the application and the parties, to determine a portion at least, if not all, of the controversy between the assignees and the stockholders. And the action of the court thereon did, in fact and in law, *conclude* the defendant upon certain and very important elements of the cause of action here sued on, which it was necessary for the assignees to aver and

prove in this action, and which are averred and were conclusively proven by the production of the record of the proceedings.

The controversy between the defendant and the assignees, with respect to the cause of action here sued on, begun on the 31st of March, 1876, on the filing of the petition of the assignees to obtain the assessment. That mode of conducting the prosecution of the assignees' claim was open to them, and those proceedings were necessary to give them a right to sue at law.

5. In order that the plea of the Statute of Limitations may avail the defendant, it must be good against the plaintiffs in the particular action in which it is interposed. The action brought is the one which must be barred by the statute, not some other action in another court which the assignees *might* have brought. The right of action, that which gave the plaintiff a standing in a court of law, was the assessment. It was the failure to pay it which, for the *first time*, enabled the plaintiffs to bring the suit they did bring. Statutes of Limitations affect only the remedy, and pleas framed under them must be applicable to the remedy sought. The assignees had two roads open to them to reach the unpaid stock in the defendant's hands. They sought the one favored by this court. They entered upon it at the proper time and in the proper and recognized mode. It would be a perversion of justice to say you ought to have taken the other road, although the other way was full of obstacles and delays, which would have consumed as much if not more time than the way you did select.

Counsel for defendants in the court below said a good deal about the policy of the bankrupt act being to compel speedy and prompt settlement of estates.

This may be true, but we think it is not its *sole* policy. The bankrupt act was not framed merely for the purpose of furnishing a short Statute of Limitations to enable stockholders to evade accounting for trust-funds in their hands, and unless the statute applies in clear and unmistakable

terms to an action of this kind, the court will not extend it by construction, but will prefer the view which will preserve the fund and enforce the trust in favor of the beneficiaries. But the criticism of counsel is not sound, considered in the light of practical results.

If the assignees had filed a bill of equity, they would have been compelled to have waited for the administration of the estate before they would have got a *final* decree. The most that a court of equity would have done would have been to allow the cause on equity to proceed as fast as the administration in the District Court. The assignees made their application as soon as the state of the bankrupt could be known with proximate accuracy (p. 56 of printed record). The mode of filing a bill in equity, involving at every step reference to and consideration of the proceedings in another and distant court, and the long time between sittings of the Circuit Court would have been awkward, expensive, and productive of more loss of time than to do as the assignees did, await the progress of the administration to a point where they could make a reasonably certain showing, and once for all obtain a sufficient assessment in a court always in session and convenient of aecess to the assignees.

6. Counsel for defendant, in the argument in the Circuit Court, claimed that because of the fraudulent character of the "discount" entered in the stock-books of the company, the right to sue at once accrued to the assignees on their appointment. This is not tenable as applied to an action at law requiring an assessment. If it did accrue it was *sub modo*. It passed to them *so far as necessary to* pay the debts of the corporation, subject to the qualifications imposed by the law of the State and by the laws of the corporation, under which an assessment and call was necessary, service of notice of which was required ten days before time of payment. If by word "discount" it was intended (which is not shown) that the stockholders should not be called on to make any more payments on account of their unpaid stock, then it was void, as we have

before shown, both for want of power in the corporation to make such a release and because it would have been a fraud on the beneficiaries of the fund. If void for both of these reasons, or either of them, then it must be regarded as not done. It must be ignored. The stockholders at the date of adjudication stood just as though no such hint of a release appeared on the books, and as though they had purchased the stock with an express agreement to pay the unpaid portion after demand made under the laws of the State and the by-laws of the corporation. And this is the argument which the law presumes, and they are no worse or any better off because both parties were silent on the subject, or because a fraudulent thing was done, which the law will not permit. To hold otherwise would be to give the stockholders the advantage of their *own wrong*, which will not be done in a court of justice. The defendant cannot plead such a fraudulent release or gift, and for the same reason he can claim no advantage from it as a fact appearing in evidence.

The capital stock of a corporation has the *quality of permanency*, and is to be kept on foot during the life of the corporation and so long as there are creditors. The assignees have not sued for all of the unpaid portion, but only for such part of it as the court has called for, and they could not, when appointed, maintain *such* an action at law.

7. Counsel for defendant in error will cite, no doubt, as they did below:

Terry *v.* Tubman, 2 Otto, 156;
Terry *v.* Anderson, 5 Otto, 682 (as referred to by the court in its opinion);
Commonwealth *v.* Colhuita Bank, 3 Allen, 50:
Baker *v.* ~~Attos~~ Bank, 9 ~~Mich.~~, 182. *Mich*

*None* of these cases touches this case at *any* point. They were all creditors' bills *in equity* to enforce statutory lia-

bilities against stockholders, running with the contracts of the corporation as collateral independent liabilities in the nature of guarantees. They were none of them suits to recover assessments on unpaid stock. R 757

In Walker, Assignee, *v.* Towner, 16 B~~ar. 285~~, cited by defendant's counsel, the suit was on an assessment and the plea of the statute was allowed, *but there the assessment had been made more than two* years before the suit was brought.

And so in the case of Payson, Assignee, *v.* Coffin, referred to by Judge Dillon, in Walker, Assignee, *v.* Towner, the suit was on an assessment made more than two years before the action was begun.

*No case can be found where a suit on an assessment, made either by a corporation or a court, has been held to have been affected by a statute of limitations until the time for the payment of the assessment had expired.* The cases are *all* the other way. *No case can be found where assignees in bankruptcy, or receivers in a court of equity, have maintained an action for unpaid stock, without an assessment made, or ordered to be made, by the court.* The cases are *all* the other way.

If these assignees have made a mistake and enabled the stockholders of this corporation to escape the obligations of a "sacred" trust, they were misled by the decisions of the courts and not by any negligence on their part in the discharge of their duties towards the creditors of the corporation and the beneficiaries of this fund.

## III.

The Statute of Limitations here pleaded does not apply *at all* to this class of actions. Section 2 of the Bankrupt Act stood before the adoption of the Revised Statutes, adopted at the session of 1873 and 1874, as follows:

SEC. 2. The several circuit courts of the United States, within and for the district courts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and

questions under this act, and, except when special provision is otherwise made, may, upon bill of petition or other proper process of any party aggrieved, hear and determine the case in a court of equity. The powers and jurisdiction hereby granted may be exercised either by said court or by any justice thereof, in term-time or vacation. Said circuit court shall also have concurrent jurisdiction with the district courts of the *same* district of all suits, at law or in equity, which may or shall be brought by the assignee in bankrupty against *any person claiming an adverse interest*, or by *such person* against such assignee, touching any property or rights of property of said bankrupt, transferable to, or vested in, such assignee; but no suit at law or in equity shall, in any case, be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property or rights of property *aforesaid*, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action *accrued* for or against such assignee; provided, that nothing herein contained shall revive a right of action barred at the time such assignee is appointed.

The first part of this section is jurisdictional, giving, first, a superintending and supervisory control to the Circuit Courts over District Courts, and from the action of which no appeal or writ of error lies to the Supreme Court; and, secondly, concurrent plenary jurisdiction, in a distinct and accurately described class of cases, to the Circuit Courts. It will be conceded that the latter part of the section operates as a limitation *only* in the cases to which concurrent jurisdiction is given; "touching the property or rights of property *aforesaid*" sufficiently indicates that.

As to what cases the Circuit Courts had jurisdiction of by this section there have been several decisions by Circuit Courts, which all concur in denying jurisdiction to actions necessary to recover debts or money due on contracts, and confining the jurisdiction to actions wherein the defendant's claim, whether assignee or claimant, was adverse as to some interest in dispute.

The language employed clearly indicates that the action must relate to something the *existence* of which is not the subject of the controversy, but which is adversely claimed. This is not so in an action to recover money on a debt. The defendants here do not claim the debt alleged, or any *interest in it*, adversely to the assignee. The controversy

is not in whom is the right of property in the debt, but is there a debt. If it is decided that there is no right of property, the defendants will not succeed as having an adverse and superior right to the debt, or any interest therein.

The language of the act is: "Which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by *such person* against such assignee." The *such person* referred to is the same person before described as an adverse claimant — in one case plaintiff, in the other defendant. This could not be true as to creditor and debtor. The defendants here could not, in the nature of things, have any action to recover any portion of the assessment from the assignees.

The Bankrupt Act, in section 1, had conferred on the District Courts jurisdiction for "the collection of all the assets" of the bankrupt. The studied use of different language, not pertinent to the mere collection of debts, in two sections, one immediately following the other, shows that Congress meant to distinguish between different subjects of controversy, having reference, more particularly in section 2, to disputes arising under section 35 of the act of 1867. The words used are not apt words to confer a general jurisdiction. They must be distended materially to admit of such a construction. Statutes are not to be so construed. They must receive the meaning which they naturally, and without strain, convey.

The following decisions construe section 2 as it stood in the act of 1867, before revision:

7 N. B. R. 353, Bachman, Assignee, *v.* Jackson, Deady, J.;

4 N. B. R. 496, Sedgwick, Assignee, *v.* Casey, Blatchford, J.;

6 N. B. R. 145, Davis, Assignee, *v.* Anderson, Treat, J.;

9 N. B. R. 38, Smith *v.* Crawford, Blatchford, J.;

39 N. Y. 302, Stevens *v.* Hauser;
11 Penn. 176, Union Canal Co. *v.* Woodside.

The act of June 22, 1874, amended section 2 by inserting in the place of the word "same," in line 12, the word "any," and, after the words "claiming an adverse interest," the words "or owing any debt to such bankrupt."

If the Circuit Court had jurisdiction to recover debts before the amendment, the amendment performs no office.

It will be claimed, however, that since the amendment the limitation clause of section 2 has been enlarged by the increased jurisdiction given to Circuit Courts by two things: first, by the intimate connection between the different parts of the section, and by the phrase, in the limitation clause, "*touching the property or rights of property aforesaid.*"

Even if section 2, at the date of the amendment, was in force as section 2, it would be more plausible than sound to say that the phrase quoted would refer to debts which were only brought into the jurisdictional clause by the amendment. If the decisions cited are correct, then the limitation clause did not apply to debts. The amendment does not profess to amend the limitation clause. It is left untouched. Statutes, like contracts, are to be construed with reference to the objects sought to be attained, and the state of things existing at the time of their adoption. Congress, with the same ease and in the same amendment, could have inserted in the limitation clause, after the phrase "touching any property or rights of property," the words "or any debt owed to the bankrupt." It did not see fit to do it, but left the limitation clause to refer to what it did before.

But the defendants are not entitled to the apparent advantage given them by considering section 2 still in force. The amendment of June 22, 1874, never did take effect as an amendment to section 2 as it stood before the adoption of the Revised Statutes. The revision went into effect on the same day of the amendment, June 22, 1874.

Rev. Stat. 1091, 1092.

All acts of Congress passed prior to December, 1, 1873, any portion of which was embraced in any section of the revision, were repealed by express language.

See same pages.

The bankrupt act of 1867 was, of course, passed prior to December 1, 1873, and the revision embraced section 2. Without, therefore, the aid of another section of the Revised Statutes, the amendment of June 22d would fall to the ground. And the same result follows whether the amendment is considered as going into effect before, at the same instant, or after the repeal.

By the revision the different parts of section 2 were sent into independent and unconnected sections, uncorrupted by each other.

The jurisdiction clause reappeared in section 4979, the limitation in section 5057, and are as follows:

SEC. 4979. The several circuit courts shall have, within each district, concurrent jurisdiction with the district court, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not, of all suits, at law or in equity, brought by an assignee in bankruptcy against any person claiming an adverse interest, or by any such person against an assignee, touching any property or rights of the bankrupt transferable to, or vested in, such assignee.

SEC. 5057. No suit, either at law or in equity, shall be maintainable in any court *between an assignee in bankruptcy and a person claiming an adverse interest*, touching any property or rights of property transferable to, or vested in, such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee; and this provision shall not, in any case, revive a right of action barred at the time when an assignee is appointed.

This is the only statute of limitations in force in the Bankrupt Act, and from it is stricken the word "aforesaid," and the language of the section made more emphatic — that it bars only suits "between the assignee and a person claiming an *adverse* interest."

It cannot be claimed that section 5057 has been amended, nor would section 4979 be affected by the amendment of

June 22, 1874, were it not for section 5601, p. 1092, of the Revised Statutes, which reads as follows:

SEC. 5601. The enactment of said revision is not to affect or repeal any act of Congress passed since the 1st day of December, one thousand eight hundred and seventy-three, and all acts passed since that date are to have full effect, as if passed *after* the enactment of this revision, and, so far as such acts vary from, or conflict in, said revision, they are to have effect as *subsequent* statutes, and as repealing any portion of the revision inconsistent therewith.

By the terms of this section it is plain that the act of June 22, 1874, can only apply to, and amend, section 4979. Said section, so amended, and as it appears in recent editions of Bump, is as follows:

SEC. 4979. The several circuit courts shall have, within each district, concurrent jurisdiction with the district court of *any* district, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not, of all suits, at law or in equity, brought by an assignee in bankruptcy against any person claiming an adverse interest, *or owing any debt to such bankrupt*, or by any such person against an assignee, touching any property or rights of the bankrupt transferable to, or vested in, such assignee.

It would seem that every pretence is taken away, by the revision, for contending that the amendment enlarging the jurisdiction also enlarges the limitation section. On the contrary, the views we have insisted on are strengthened by the consideration that section 4979, as it now stands, divides the suits over which circuit courts have jurisdiction, into two classes, one class being where the claims of the assignee and claimant are adverse as to the subject-matter of the controversy, and the other class being actions to recover debts owed to the bankrupt.

Section 5057 applies, by using the *same* language, only to the first class of actions.

The eighth section of the bankrupt act of 1841 was as follows:

SEC. 8. The circuit court shall have concurrent jurisdiction with the district courts of all suits, in law or equity, which may and shall

be brought by an assignee in bankruptcy against any person *claiming an adverse interest*, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to, or vested in, such assignee; and no suit at law or in equity shall, in any case, be maintainable by or against *any person claiming an adverse interest*, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years after the declaration and decree in bankruptcy, or after the cause of suit shall first have accrued.

This is, in effect, the same as section 2 of 1867.
In the cases of —

Stevens *v.* Hauser, 39 N. Y. 302;
Union Canal Co. *v.* Woodside, 11 Penn. 176;
Carr *v.* Lord, 29 Maine, 54, Shepley, J.; and
*In re* Conant, 5 Blatchford, 54, Nelson J.,

it was decided that the eighth section of the act of 1841, both as to jurisdiction and limitation, applied only to actions where the interest in the subject-matter was adverse.

Nelson, J., gave a strong reason in vindication of Congress. He said: "These suits affect the assets of the bankrupt, and an adjustment of them, either by suit or compromise, is indispensible to a settlement and distribution of the estate among the creditors." No reasons are, however, necessary to justify distinctions made by a Congress or a Legislature. From the first Statute of Limitations of 21 James I., ch. 16, down to the last act passed by the most obscure State, distinctions have been made. The administration of a bankrupt's estate is entrusted to the bankrupt court, which may be fairly presumed to hasten the collection of mere debts, which by law are scheduled so as to be open to the inspection of the court, while such schedule does not present *adverse* claims to the property scheduled. It presents merely the bankrupt's *own* claim to the property. It is the bankrupt's schedule which is filed, and not the adverse claimant's. The two years are, therefore, given to present adverse claims, so that, after

that time, the court may deal with the estate, dispose of it, and distribute it as a certain unencumbered estate.

Against cases cited, construing the eighth section, will be produced only two cases:

Mitchell *v.* Great Works Milling Co. 2 Story;
Pritchard *v.* Chandler, 2 Curtis C. C. 448.

The last case merely follows the first. We can afford to offset against these cases the cases cited, and the powerful criticisms of Judge Blatchford and Judge Deady, in 9 N. B. R. and 7 N. B. R., already cited.

We will be referred to the opinion of Judge Miller, in Bailey, Assignee, *v.* Glover, 21 Wall. 345, in which the strong language of Justice Miller is supposed to favor the construction of the defendants. That decision, however, must be taken in connection with the case itself, which was a suit brought to set aside a conveyance to a fraudulent grantee. Manifestly the defendant was an adverse claimant. In that case the assignee was allowed to maintain his action, although begun more than two years from his appointment, the court holding that the statute did not run until the fraud was discovered by the assignee.

In 17 Howard, 315, Clark *v.* Clark, in which the Statute of Limitation was pleaded, the Supreme Court said: "The interest adversely claimed, and which the statute protects, *is an interest in a claim, other than a bankrupt.*"

To the cases supporting the other view should be added the case of Payson *v.* Coffin, referred to by Judge Dillon in Walker, Assignee, *v.* Turner, 16 N. B. R. The last case was decided upon the authority of the decision of Justice Miller, in Payson *v.* Coffin, in the Circuit Court of Kansas. In that case counsel for assignees did not present to the court the fact that it was a trust fund, or show to the court the changes which the revision had made in the law. If this had been done, then the case cited would have been authority, but it was not done. We say it was not done, because

the writer was there; and inasmuch as it is a verbal opinion, it is proper for us to say what did occur.

The case of Lathrop, Assignee, *v.* Drake et al., 1 Otto, 516, does not apply, because the action was to recover the *value* of property *converted* in fraud of the bankrupt act. Such was the case in 21 Wall. 342, Bailey *v.* Glover.

This question is an open one for this court.

## IV.

One of the questions presented by the record in this case is whether or not the increase of the capital stock of the corporation from $200,000 to $300,000, and from $300,000 to $400,000 was *ultra vires*, not only as to the corporation but as to creditors, and which should be passed on by the court. The court below did not pass on it. We claim that it was good as to creditors.

The assignees represent in these suits the creditors, and are entitled to use every claim or plea which the creditors could make were they parties to the record. The increase of the capital stock is a thing done by the stockholders and directors *within* the corporation. The creditors take no part in it — cannot control or direct it. They are not required to know whether the things which have been done without their knowledge are sufficient to accomplish what it is pretended has been accomplished, or not. The creditors may take that for granted which the corporation represents has been done. It may be conceded that the general powers of corporations to make any particular kind of contracts must be taken notice of; but this principle would not reach creditors so as to affect them with notice of the steps taken by the corporation in increasing its stock. The ancestry of a corporation is presumed to be legitimate.

The doctrine of estoppel is applied in the following cases in favor of assignees:

2 Dillon, 428, Payson *v.* Stoever;
3 Bissell, 417, Upton *v.* Hansbrough.

It is shown in this case that the defendant voted for the increase of stock, and that the directors made the increase, and filed with the Secretary of State the certificate of such increase; that afterwards he received his stock, paying thereon 50 cents on the dollar, and receiving certificates for the same; that, after the increase, the company advertised and held itself out as having a capital of $400,000; that it invited and obtained credit on the faith of such holding out; that debts so contracted remain unpaid, and have been proven up. It is, therefore, too late for the stockholders who actively participated in so increasing the stock, and who, if its affairs had prospered, would have got the benefit of it on the basis of all their stock, to now plead *ultra vires*. If the increase was in fact invalid, it might have been made good by an amendment of their charter or the subsequent ratification by the Legislature. Creditors cannot be placed in a worse position than if that had been done which might have been done. All things are presumed to be correctly done which the corporation assumes to have been done.

3 Met. 287, Narragansett Bank *v.* Atlantic Silk Co.

Certificates required by law to be filed as compliance with the law cannot be disputed.

15 Gray, 494, Dooley *v.* Cheshire Glass Co.

The individual members of a corporation cannot set up their own faults or mistakes against creditors.

13 N. Y. Supreme Court, 164–293;
45 Pa. St. 32, McHose *v.* Wheeler;
72 Ill. 296.

Where a stockholder participates in the proceedings for

increase of stock, he cannot question the validity of the acts.

51 Mo., 464, Kansas City Hotel Co. *v.* John Harris.

It is well established that the State alone can inquire into the validity of acts done by a corporation, since it is the creature of the State. It cannot be done in any collateral proceeding. If the State sees fit to decline the inquiry, the company or its members cannot institute the investigation when sued by creditors.

Ang. & Ames on Corp. 518–636.
1 Sandf. 168.

It may have been an abuse of power for this company to increase its stock to $400,000, but its consequences must fall upon those who moved the corporation to do it, and not upon the creditor. To hold otherwise would be to violate every principle of natural equity.

The State of Kansas did not see fit to restrain this alleged usurpation, but indulged the corportation in the increase, and these defendants in the possesion, of the stock. For nearly two years they held their stock and were entitled to dividends upon it, and now they ask the court to call it mere corporate jugglery, which, although it deceived the public, was not to mean anything any longer than it could be held without responsibility.

But the defendants do not stop here; they ask the court to credit the sums paid for this alleged illegal stock on the amounts unpaid on the stock conceded to be valid. Were it not that this claim is presented in the agreement, and our silence might be construed to be acquiescence, we would make no reply to it. The first answer to it is that, if this stock is invalid, and if the creditors are to bear the burdens of its illegality, then the stockholders knew it when they were paying for it, obtained all they were to obtain, and have no claim of any kind, on account of it, against the

company or its assignees. This question, however, is not properly here for consideration. It can only arise in the Bankrupt Court when they attempt to prove for money had and received.

Another answer is that neither the defendants nor the company intended such an application, but did intend and did in fact apply it to pay for something else, viz., the shares of the increase of stock taken by the defendants. The law never makes an appropriation of payments where either the creditor or debtor has made it. When neither makes it, then the law makes it as the justice and equity of the case may require.

2 Pars. on Con. 629.

If the stockholders have any claim against the corporation it is for money had and received, which they can prove as against the estate in the District Court, but they cannot use it as a set-off against the assignees.

And the same applies to the notes declared on by defendant, by way of set-off in his answer.

17 Wall, 610 Sawyer *v.* Hoag.

It is respectfully submitted that the judgment of the Circuit Court should be reversed.

J. E. McKEIGHAN, *with whom is*
A. A. RANNEY,
*For the Plaintiff in Error.*

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SUPREME COURT U.S.

# Supreme Court of the United States.

OCTOBER TERM, 1881.

SCOVILLE ET AL., ASSIGNEES, *Plaintiffs in Error*,

*v.*

NATHANIEL THAYER, *Defendant in Error.*

## BRIEF FOR DEFENDANT IN ERROR.

### STATEMENT OF CASE.

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NATHANIEL THAYER, *Defendant in Error*.

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## BRIEF FOR DEFENDANT IN ERROR.

### STATEMENT OF CASE.

The Fort Scott Coal and Mining Company was incorporated under the General Laws of the State of Kansas, with a capital stock of $100,000, Nov. 25, 1870. (Rec. p. 33.)

By the laws of Kansas, any corporation may increase its capital stock to any amount not exceeding double the amount of its authorized capital. (Stats. of Kansas, Chap. 23, § 14.)

Acting under this law, the corporation increased its capital stock, April 19, 1871, to $200,000. (Page 33.)

A further increase of capital stock to the amount of $100,000 was attempted to be made Oct. 16, 1872, and a still further increase of like amount Dec. 27, 1872. The nominal capital was thus raised to $400,000. (*Ib.*)

April 2, 1874, proceedings in bankruptcy were begun against said corporation (Exhibit E, p. 47), and plaintiffs were chosen assignees April 29, 1874. (Page 52.)

March 31, 1876, a petition to assess the capital stock was filed in the Court in which the bankruptcy proceedings were pending, and April 5, 1876, an order was issued upon said petition to the stockholders to show cause why the assessment should not be made. (Exhibit F, p. 53.)

June 10, 1876, an order and decree of assessment was made and filed, whereby each and every holder of stock was assessed $76 per share, less the amounts already paid in on his stock, and in default of payment the assignees were directed to sue for and collect the same; and the assignees were directed to make a call and assessment in accordance with said order, and to return the same into Court before July 21, 1876. (Pages 63, 64.) July 17, 1876, the assignees made a call and assessment (p. 66), by which each stockholder was called on to pay in seventy-six per cent of the par value of his stock, less any sums that might have been paid thereon; but no stockholders were named, nor was the amount due from any individual or on account of any particular share of stock named. The call was general upon all the stockholders, and each was left to compute his own liability, or to let it be fixed in a suit.

This suit is brought to recover from the defendant the amount which upon computation is found to result from charging him with seventy-six per cent of his stock, and crediting him with what appears to have been paid thereon.

The stock was all issued as full paid, the company charging to discount at the time of each issue the difference between the amounts received by it and the par of the stock.

The claim of the defendant is: —

1. That the stock purporting to have been created by the third and fourth issues, being in excess of the amount permitted by the laws of Kansas, is wholly void as *ultra vires* of the corporation, and that no obligation can rest upon the defendant by reason of his holding the same.

2. That being void, the amounts paid in respect of it are to be credited him upon the amounts, if any, due by him in respect of his stock of the first and second issues.

3. That the action is barred by the special Statute of Limitations to actions by and against assignees (R. S., § 5057), having been brought by the assignees more than two years after their appointment.

The case was submitted to the Circuit Court upon an agreed statement of facts. As the case was one of a large number involving the same general questions with some differences in the details of the facts, a single statement was made embracing the facts in all the cases and pointing out the peculiarities of the different cases. That statement was filed in this case and is embodied in the report. It contains, therefore, much that is inapplicable to the present case. The Circuit Court gave judgment for the defendant, and in the opinion (p. 81) rested the decision solely on the last of the three grounds of defence above specified, viz., the Statute of Limitations, without passing upon the others.

We shall, however, discuss the other two grounds in this brief as, if the opinion of the Court should be overruled on the point discussed therein, its judgment may yet be sustained upon one or both of the other grounds.

## I.

The stock of the third and fourth issues was absolutely null and void, and a defendant holding no other stock never was and is not a stockholder of the bankrupt corporation.

It appears that the original capital stock of the corporation as fixed by its charter was $100,000. (Exhibit A, p. 13.)

By Kansas Statutes, Chap. 23, § 14, it is provided that "any corporation may increase its capital stock to any amount not exceeding double the amount of their authorized capital." (See Appendix B to this brief.)

The "authorized capital" must mean the capital authorized or fixed in the charter; otherwise the limitation upon the amount of capital would be senseless and wholly nugatory. The articles of association of a corporation are called in the Kansas statutes its "charter." (Gen. Stats., Chap. 23, Art. 2, §§ 6–10.) (Appendix B.) By the Constitution of Kansas there can be no special charters. (Art. 12, Gen. Stats. 1868, p. 55.) (Appendix A.)

The corporation, therefore, was powerless to create capital stock beyond the amount of $200,000.

When a corporation issues what purports to be stock beyond the amount permitted by its charter, such issues are wholly void, and are not stock at all. The holder of certificates of such spurious stock is not a stockholder.

Mech. Bank *v.* N. Y. & N. H. R. R., 13 N. Y. 599, 612, 613.
N. Y. & N. H. R. R. *v.* Schuyler *et al.*, 34 N. Y. 30, 49.
Green's Brice's Ultra Vires, p. 112, note.
2 Lindley on Partnership (3d Ed.), 1381, 1416.
Field on Corporations, § 144.
Stace & Worth's case, L. R. 4 Ch. 682.

## II.

The defendant is not estopped to set up the nullity of the supposed stock standing in his name.

2 Lindley on Partnership (3d Ed.), 1381.
Alabaster's case, L. R. 7 Eq. 273.
Bank of Hindostan *v.* Alison, L. R. 6 C. P. 54.
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1. The cases of Chubb *v.* Upton, 5 Otto, 665; Pullman *v.* Upton, 6 Otto, 328; Upton *v.* Englehart, 3 Dillon, 496; Upton *v.* Hansbrough, 10 B. R. 369, 3 Biss. 417; Upton *v.* Tribilcock, 1 Otto, 45, decide that the stockholder cannot set up informalities in the issue of stock which the corporation had the power to create; but the grounds of decision have no bearing upon a case like the present, where the creation of the stock was beyond the power of the corporation.

In those cases the statute authorized the increase of stock in question. "It was the case of an organization which claimed to have taken and apparently supposed that it had taken the measures required by law to complete its increase

of capital." (Chubb *v.* Upton, 5 Otto, 665, 668.) The act undertaken was legal and *intra vires*. The defect was mere informality in the performance of it, and, as to the defendant, was held to be cured by his acquiescence and his taking part in it. In the present case, the act undertaken was illegal and distinctly *ultra vires*. No acquiescence or sharing in the attempt could give it validity, or bind either the corporation or the defendant. In the language of Vice-Chancellor James, in Stace & Worth's case (L. R. 4 Ch. 687, note), "This was a void agreement, with a void acting upon it, a void recognition, and a void ratification by the acts which have been mentioned. It comes to an aggregate of nothings, and that aggregate of nothings is all that there is to fix these gentlemen on the list of shareholders."

"A distinction must be made between shares which the company has no power to issue, and shares which the company has power to issue, although not in the manner in which or upon the terms upon which they have been issued. The holders of shares which the company have no power to issue, in truth hold nothing at all, and are not contributories."

2 Lindley on Part. (3d Ed.), 1381.
See Thompson on Liability of Stockholders, § 115.
Mackley's Case, 1 Ch. Div. 247.

And see, further, on the distinction between acts done in the line of the company's powers but without due formality, and acts beyond the corporate powers,

Pearce *v.* M. & P. R. R. Co., 21 How. 441.
Zabriskie *v.* C. C. & C. R. R.Co., 23 How. 381, 398.

To assess $400,000 on account of capital stock in a corporation which could by law have only $200,000, would be to command the corporation and its shareholders to violate the law which they are bound to obey.

2. The action of the managers of the company at Fort Scott in advertising the company as having $400,000 capital

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2. The action of the managers of the company at Fort Scott in advertising the company as having $400,000 capital

stock, in printing that sum as the amount of its capital stock on letters and billheads, and representing to sundry banks and others that its capital stock was $400,000, cannot work an estoppel. (Record, p. 41.)

*a.* It is clear that no such representations could have made the capital more than the chartered amount. The officers had no authority to make them and the public had no right to trust them. The laws secured to the public and the creditors an infallible mode of ascertaining the real capital of the company; viz., by examining the records in the Secretary of State's office, and the Constitution and statutes of Kansas. If they failed to do this they acted at their own risk. (Pearce *v.* M. & P. R. R. Co., *supra.*) They had no more right to rely on billheads and statements of officers than they would have had if no attempt had been made to make the fact correspond to the representation. Knowing, or bound to know, that the law permitted no such increase, they were equally bound to know that no such increase had been made, and that any representation that it had been made must be erroneous.

*b.* The officers and agents who made the representations were not the agents of the individual shareholders. They could estop by their action no one but the corporation which employed them.

*c.* If any creditor has been defrauded by misrepresentations of the real capital of the company, he has his remedy in an action of tort against all who participated in the fraud. But the wrong done to him cannot entitle the entire body of creditors, who have not suffered from the supposed fraud, to recover of the entire body of stockholders who have taken no part in it.

III.

The defendant holding both classes of stock, so far as he is sued for assessments upon the spurious stock, has the same defence. It cannot make him liable upon this stock that he also has valid stock in the bankrupt corporation.

The assessment on his spurious stock is void.

## IV.

The defendant, as a holder of spurious stock of the third and fourth issues, is entitled to have the payments he has made to the corporation on account of such stock credited to him on account of the assessment made upon his stock of the first and second issues.

Mr. Thayer holds of the valid stock two hundred and eighty-five shares, upon which he paid $9,400; and of the void stock, five hundred and eighty-five shares, upon which he has paid $50 per share, or $29,250. (Rep. p. 34.) On the plaintiff's assumption he owes the corporation $19,100 on the valid stock. He has paid them on stock account for spurious stock $29,250, for which he has received no consideration. We claim that he is entitled to be credited with the $29,250 in this action, extinguishing the claim of the assignee.

As between Mr. Thayer and the corporation, there could be no doubt of his right to set off against assessments on shares not fully paid, any money of his in the hands of the company, or indeed any debt due him from the company.

It is held, however, that a holder of claims against an insolvent corporation, cannot set them off against his liability to assessments on his stock in that corporation in a suit by an assignee in bankruptcy.

Scammon *v.* Kimball, 2 Otto, 362.
Sawyer *v.* Hoag, 17 Wallace, 610.
Jenkins *v.* Armour, 14 B. R. 276.

[redacted]

Wallace, p. 622.)

In the present case the supposed capital stock was

$400,000, and that was the supposed trust fund. But the real capital turns out to have been only $200,000, and that is the extent of the real trust fund. The law permitted no more than the latter sum to be raised, and the creditors and the public must be held to have known it. They had the same means of knowing it that they had of knowing the supposed amount of capital stock; viz., the public statutes and the returns to the Secretary of State's office, Exhibits A, B, C, D, Record, pp. 13–22. The creditors can claim and the Court can recognize only a trust fund of $200,000 as a security for the debts of the company. All money that has been paid in as capital stock has been paid into that fund, and the party paying any money to that fund is entitled to credit upon his dues to that fund. To use the language of this Court in Sawyer *v.* Hoag: "The two claims" *are* "mutual"; they *are* "in the same right." The defendant owes the trust fund nothing. He has paid into the trust fund $29,250, for which he has received nothing, and for which the trust fund upon equitable principles must give him credit, at least to the extent of extinguishing its claims upon him.

## V.

The Statute of Limitations in the Act relating to Bankruptcy, R. S. § 5,057, is a bar to the maintenance of the present action.

There is a great preponderance of authority to the point that by the true construction of this Act it applies "to all

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There is a great preponderance of authority to the point that by the true construction of this Act it applies "to all

judicial contests between the assignee and any person whose interest is adverse to his," including the debtors of the bankrupt.

Bailey *v.* Glover, 21 Wall. 242.
Walker *v.* Towner, 4 Dill. 165.
Payson *v.* Coffin, 4 Dill. 386, 5 Dill. 473.
Norton *v.* Villebeuve, 1 Woods, 163.
Mittenberger *v.* Phillips, 2 Woods, 115.
Foreman *v.* Bigelow, 4 Cliff. 508.

It will be claimed, however, that there is no authoritative decision of the point, in this court; the case of Bailey *v.* Glover not having raised the question, and the other cases cited having been decided at the circuit; and it will be argued that neither a stockholder whose stock has not been paid nor any other debtor is a person claiming an adverse interest touching any property, etc., of the bankrupt.

It would seem the reasonable construction of the language of § 5,057, that a claim for assessments of stock or any other debt is a right of property which vests in the assignee, and that the stockholder or other debtor who refuses to pay is an adverse claimant; and so Judges Story, McLean and Curtis held in construing the corresponding language of the Act of 1841.

Mitchell *v.* Great Works Milling Co., 2 Sto. 648, 660.
McLean *v.* LaFayette Bank, 3 McL. 185, 188.
Pritchard *v.* Chandler, 2 Curt. C. C. 488.

And surely the policy of the Bankrupt Act — which is to cause the estate to be wound up with reasonable despatch — requires promptness in the prosecution of claims for money as much as in the settlement of controversies respecting other kinds of property.

Norton *v.* Villebeuve, 1 Woods, 163.

The case of Carr *v.* Lord, 29 Me. 54, was decided otherwise in ignorance of the previous decision by Judge Story,

and upon the assumption, for which no reason is given, that a debtor could not be an adverse claimant in the sense of the Act. The same may be said of the case of Union Canal Co. *v.* Woodside, 11 Pa. 176.

The cases of Stevens *v.* Hauser, 39 N. Y. 302, and *in re* Conant, 5 Blatchford, 54, only decided that the statute did not apply to actions for wrongs done to the assignee after his appointment.

These cases arose under the Act of 1841.

The cases which have arisen under the Act of 1867, and in which decisions have been made favorable to plaintiffs' claim, are certainly of inferior authority to those above cited for the defendant; and we submit that they fail to show sound reasons for the results arrived at.

No argument against us can be based on the amendment made in 1874 to the portion of the second section of the Act of 1867 which relates to the jurisdiction of the Court. According to our construction that amendment was unnecessary and had no effect. It merely showed a purpose on the part of Congress to settle the disputed construction in favor of the view taken by the earlier and the latest as well as the weightiest authorities.

2. It appears that the present suit was brought more than two years after the appointment of the assignee, but less than two years after the order of the Bankruptcy Court directing the assessment of the capital stock.

If, then, the cause of action accrued to the assignee at the time of his appointment, the bar of the statute applies. If it did not accrue till the assessment was made by order of the Court, then it is not barred.

We contend that it accrued to the assignee at once upon his appointment.

3. The "cause of action" is the obligation of the defendants to pay up for the benefit of creditors the amounts unpaid upon stock held by them and issued as full paid. It is not the assessment by order of the Bankrupt Court.

*a.* At any time after the failure of the corporation, any

creditor could have brought a bill against the corporation and its stockholders, to compel an assessment of the capital stock so far as it remains unpaid, and a payment by the several stockholders of the assessments which they were severally liable to pay.

Terry *v.* Anderson, 5 Otto, 628.
Ogilvie *v.* Knox Ins. Co., 22 How. 380.
Ward *v.* Griswoldville Mfg. Co., 16 Conn. 593, 599.
Adler *v.* Milwaukee Pat. Br. Co., 13 Wis. 57, 61.
Henry *v.* Vermilion, etc. Co., 17 Ohio, 187.

*b.* The right of the creditors rests on the right of the corporation, as against the subscribers to its capital stock and those who have succeeded to their liabilities, to compel the payment of so much of the capital as has not already heen paid in.

Ogilvie *v.* Knox Ins. Co., 22 How. 380, 387.

"As stockholders who have not paid in the whole amount of the stock subscribed and owned by them, they stand in the relation of debtors to the corporation for the amounts due by each of them. As to them, this bill is in the nature of an attachment in which they are called on to answer as garnishees of the principal debtor."

*Per* Grier, J., 22 How. 387.
Ward *v.* Griswoldville Mfg. Co., 16 Conn. 599.
Adler *v.* Milwaukee P. B. Co., 13 Wis. 61.
Waterhouse *v.* Jamieson, L. R. 2 Sc. Ap. 29.

*c.* The suit may be brought by the corporation itself, or by the stockholders who have paid in full, against delinquent subscribers, for the purpose of paying the corporate debts.

Society, etc. *v.* Abbott, 2 Beav. 559.
Walworth *v.* Holt, 4 My. & Cr. 619.
Nathan *v.* Whitlock, 9 Paige, 152, 160.

*d.* And upon the bankruptcy of the corporation, the suit, which up to that time might have been brought by any creditor or by the corporation itself, may be brought by the assignee, who represents both the corporation and the creditors, and succeeds to all their rights, against the debtors to the corporation.

Sawyer *v.* Hoag, 17 Wall. 610, 620.
Pollard *v.* Bailey, 20 Wall. 520.

"The assignee might have filed a bill in equity against all the delinquent stockholders jointly."

Sanger *v.* Upton, 1 Otto, 56, 62.

"I take the law to be that the assignee has all the rights and powers which are given to the whole body of creditors or to the whole of any one class of creditors, whether at law or equity, and may maintain any suit for which, for instance, a creditor's bill would lie." Lowell, J., in Wilkins *v.* Davis, 2 Lowell, 511, 518.

*e.* The practice of making an assessment under the direction of the Court of Bankruptcy is accounted for by the fact that in the cases in which such assessments have heretofore been made, the stock was, and upon its face appeared to be, only partially paid, and subject to assessment only by regular calls or some substitute therefor. The subscriber's contract was thought to entitle him to a call.

Chandler *v.* Siddle, 3 Dill. 477.

But in the present case the stock was originally issued as full-paid. No calls could have been made or were necessary. The subscribers became bound, upon taking full-paid shares, to pay for them in full, and no agreement on the part of the corporation to treat the unpaid portion as paid could be set up in any suit brought for the benefit of creditors. (Upton *v.* Tribilcock, *supra.*) The defendants, therefore, so far as

liable at all, were debtors to the corporation for payment of its debts to the amount unpaid on their shares; and those amounts could, immediately upon his appointment, have been sued for by the assignee, in equity, and perhaps at law, as debts absolutely due.

Henry *v.* Vermilion R. R. Co., 17 Ohio, 187.
Terry *v.* Anderson, 5 Otto, 628.
Marsh *v.* Burroughs, 1 Woods, 463.

The reason for an assessment does not, therefore, apply to the present case. There was no contract to pay upon assessment and call, and no need of either.

The only contract was that raised by the law against the intent of the stockholder, to pay in full, for the benefit of creditors, the stock which he had received as full paid.

*f.* But whatever reasons may have led to assessments by the Bankruptcy Court, instead of suits in equity by the assignees, without previous assessment, it is obvious that the difference between the two methods of procedure is one of remedy and not of right, and that the cause of action in both methods is the same, — viz., the obligation of the stockholders and not the assessment by the Court.

It will accordingly be found that in all the actions which have been brought against stockholders by assignees, including those now before the Court, the facts deemed necessary to establish the original liability have been alleged and established without relying on the order of the Bankrupt Court as merging the old cause of action or creating a new one. And in most of the cases, after the assessment by the Bankrupt Court, a trial has been had upon the original merits, and the courts have dealt with all the defences as open, notwithstanding the assessments.

Upton *v.* Tribilcock, 1 Otto, 45.
Webster *v.* Upton, 1 Otto, 65.
Chubb *v.* Upton, 5 Otto, 665.

Upton *v.* Englehart, 3 Dill. 496.
Michener *v.* Payson, 13 B. R. 49.
Lamb *v.* Lamb, 6 Biss, 420.

*g.* There is evidently nothing in the bankruptcy proceedings to create a new cause of action, or to merge or destroy, or even suspend, the cause of action, which accrued to the assignee on his appointment.

There is no specific decree for the payment of money against each or any of the defendants severally, upon which an action could be maintained for a definite sum. The assessment is for seventy-six per cent, each stockholder to be credited with the amount that may have been paid upon any share of stock held by him. (Pages 66, 67.) No stockholder is named in the assessment, nor are any sums named for which the several defendants are liable.

Such a decree is no merger of the original cause of action, and cannot be the foundation of a suit.

Pennington *v.* Gibson, 16 How. 65.
Sadler *v.* Robins, 1 Campb. 253.
Seligman *v.* Kalkman, 17 Cal. 152.

*h.* In suits of an analogous description brought for the benefit of creditors, upon a statutory liability of stockholders to make good the impaired capital stock of the corporation, it was expressly decided in Massachusetts that the liability attached and the Statute of Limitations began to run immediately upon the commencement of proceedings against the corporation, and not at the time when, in the course of the winding up, the amount of the deficiency had been determined. It was held that if the liability of stockholders to a bill in equity or any other process for the benefit of the bill holders existed, the Statute of Limitations began to run from the time when such liability accrued, and would bar an action to enforce a remedy founded upon an assessment made in the cause, although that remedy had not existed for the statute period.

It was contended that the statute began to run when the plaintiff's title to the relief prayed for accrued. It was held that it began to run when the defendant's liability in any form accrued.

It was further contended that the statute did not begin to run until the amount of the defendant's liability was ascertained in the winding-up process; but it was held that proceedings against stockholders might begin without waiting for the amount of their liability to be so determined, and might go on *pari passu* with the winding-up proceedings.

It was further held, that, if it was otherwise, it followed that the proceedings for ascertaining the amount must be completed and the action must be brought within the statutory period.

Baker *v.* Atlas Bank, 9 Met. 182.
Commonwealth *v.* Cochituate Bank, 3 Allen, 42.

The reasoning of these cases is decisive of the present case; but recent decisions of the Supreme Court of the United States have a still closer application as well as a binding force.

In Terry *v.* Tubman, 2 Otto, 156, the Court held that the liability of a stockholder of a bank, under a statute providing that the individual property of the stockholders should be bound for the ultimate redemption of the bills of the bank, accrued, and the Statute of Limitations began to run, immediately upon the notorious insolvency of the bank, and not when the deficiency in the assets of the bank had been ascertained; and in Terry *v.* Anderson, 5 Otto, 628, which was a bill brought by a creditor against assignees and stockholders of an insolvent bank, to compel the former to collect and the latter to pay the amounts remaining unpaid upon their shares, it was held that such unpaid amounts were debts due to the bank, and might, in the absence of any provision in the charter of the corporation requiring assessments and calls as a condition precedent to liability, have been collected by the bank at any time, and were therefore

barred by the lapse of the time limiting actions since the failure of the bank.

See also Godfrey *v.* Terry, 7 Otto, 171.
Terry *v.* McCane, 13 Otto, 442.
*Re* Portsmouth Banking Company, Stokes & Horsey's Cases, L. R. 2 Eq. 167, 176.

Carwell v Green 2 Otto 509

In the present case there is no charter or statute entitling subscribers to stock to a call before suit; and if there were, it would be inapplicable, because such a provision applies only where the stock has been issued as partially paid, and not where it has been issued as full-paid. In the latter case there is no right to make or to insist upon a call, because the stock is immediately payable. If, then, the company had gone into bankruptcy after the limitation of actions by the corporation against the stockholder had expired, Terry *v.* Anderson is decisive that no right of action would have accrued to the assignees, and no assessment could have been made. Upon the same reasoning, the right of action remaining in the corporation did accrue to the assignees immediately on their appointment, and is barred by the subsequent lapse of two years before bringing suit.

*i.* The by-law passed Nov. 13 1873 (Rec. p. 41), providing for assessments of capital stock by the directors, could not affect the defendant's liability to pay his stock without assessment.

(1.) It was passed after all the stock of the corporation had been issued, including the spurious stock (p. 58, Exh. "A," NATHANIEL THAYER), and therefore there was no stock to which it could apply. The corporation had, by issuing its entire stock as full-paid, lost the power to assess it except for the benefit of creditors. The by-law regulating the exercise of a power which the corporation had lost was therefore wholly nugatory.

(2 ) The issue of the stock, as full-paid, raised an obligation to pay for it for the benefit of creditors without assessment, and that obligation could not be modified by any subsequent action of the corporation. (*Supra*, p. 13.)

*j*. It may be urged that although the assignee might have brought his bill in equity against all tne stockholders on his appointment, he could not have brought his several actions at law until after an assessment, and that therefore the assessment is the foundation of the present actions, which for that reason are not barred.

To this we answer:—

(1.) According to the reasoning of the authorities just cited, an action at law accrued at once to the assignee, upon his appointment, against each stockholder for the amount unpaid upon his stock without any call, because the stock was issued as full-paid, and therefore raised a liability in the taker to pay it at once without assessment or call.

See also *supra*, p. 13.

If a stockholder were sued, he could not set up that, by the by-laws of the corporation or the terms of his subscription, he was only bound to pay for his stock as calls were made, either by the directors or by some tribunal having in charge the liquidation of the company, as in the case of holders of stock which was issued as only partly paid The answer would be that, having taken the stock as full-paid, he became bound to pay the whole, and that calls were only necessary where the agreement between the stockholder and the corporation provided for them, either expressly or by the nature of the contract involved in the issue of stock as and for partly paid stock. No case has arisen before in which an assignee has proceeded to enforce payment of stock improperly issued as full-paid; but it is submitted that upon principle and authority he might have proceeded directly as upon a debt already due.

(2.) If this were otherwise, it is nevertheless a sufficient objection to his maintaining this action that he might have maintained his bill in equity without waiting for the assessment by the Bankrupt Court.

He had his election either to proceed in equity at once, or to make an assessment under order of the Bankrupt Court, and then proceed at law.

He might, with proper diligence, have obtained his assessment in season to have brought his actions within the two years; for it cannot be necessary that the precise condition of the estate should be ascertained before making an assessment. On the contrary, the proper course is to make an assessment at once upon an approximate estimate of the condition of the estate.

Kennedy *v.* Gibson, 8 Wall. 498, 505.
Com'th *v.* Cochituate Bank, 3 Allen, 42, 50.
Baker *v.* Atlas Bank, 9 Met. 182, 197, 198.

Says this Court in Kennedy *v.* Gibson, "It would be attended with injurious consequences to forbid action against the stockholders until the precise amount necessary to be collected shall be formally ascertained. This would greatly protract the final settlement, and might be attended with large losses by insolvency and otherwise in the intervening time. The amount must depend in part upon the solvency of the debtors and the validity of the claims. Time will be consumed in the application of these tests, and the results in many cases cannot be foreseen. The same remarks apply to the enforced collections from the stockholders. A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it. If too much be collected, it is provided by the statute, that any surplus which may remain after satisfying all demands against the association shall be paid over to the stockholders. It is better they should pay more than may prove to be needed than that the evils of delay should be encountered."

But if this were not so, and the actions at law could not with due diligence have been brought within two years, then it was the duty of the assignee to have elected the remedy which could be availed of within the time of limitation. He should have brought his bill in equity.

It is not the action, but the *cause* of action, the accruing of which causes the statute to begin to run; and the assignee

cannot gain time to prosecute a claim by electing a remedy which cannot be made available till after the claim is barred.

In the case of Baker *v.* Atlas Bank, above cited, Mr. Justice Wilde uses the following language, which is closely applicable to the cases at bar: —

"It was then argued by the plaintiffs' counsel that the statute did not begin to run until the plaintiffs' right to sue in equity accrued, which was not before the receivers of the bank refused to commence an action for their benefit. But if this argument would hold good, the plaintiffs might delay their application to the directors of the bank, or the receivers, for any length of time, and the statute would be inoperative and nugatory. It has also been argued that the statute did not begin to run until it was first ascertained what would be paid by the assets of the bank. But we think that suits might be commenced against the bank and against the stockholders at the same time, and the suits might go on *pari passu*. But there is another and a conclusive answer to both of these arguments. The demand sought to be enforced in this suit was a debt alleged to be due to the bank. Whenever, therefore, the bank became insolvent by the loss of its capital stock, an action accrued to the bank . . . to recover a sum from the stockholders respectively, equal to each one's share of the stock. The statute, therefore, began to run, in strictness, immediately on the loss of the capital stock, and certainly when the bank stopped payment; and after the lapse of six years from that time the debt was barred, and as effectually as though it had been actually paid. So also if, after the insolvency of the bank, the stockholders became directly liable to the creditors, the plaintiff's right of action accrued immediately upon the loss of the whole capital stock, and the Statute of Limitations is a bar to the plaintiff's demand in any form of action."

And in Commonwealth *v.* Cochituate Bank, 3 Allen, 50, after quoting from the foregoing extract, Mr. Justice Dewey proceeds as follows: —

"To avoid the operation of the Statute of Limitations, it is not, however, necessary that the proceedings be com-

menced at the same time. The proceeding by injunction and the appointment of receivers may precede the filing of a bill against the stockholders any length of time less than six years, thus giving full opportunity to ascertain the amount of assets applicable to the payment of the outstanding bills of the bank."

The policy of the statute which calls for speedy settlement of bankrupt estates favors the construction for which we contend.

Bailey *v.* Glover, 21 Wall. 342.
Norton *v.* Villebeuve, 1 Woods, 163.

And considerations of general equity and public policy are equally strong in our favor.

It would be a serious grievance if an assignee of a bankrupt corporation might keep the estate unsettled for years, and then, by procuring from the Bankruptcy Court an assessment of the capital stock, create a liability on the part of stockholders to actions at any time within two years from such assessment.

Stockholders may lose their property, or may die, and the remedy against their estate be outlawed, leaving larger burdens to be borne by those who remain living and solvent.

It is the policy of the Bankrupt Act to compel the speedy and prompt settlement of estates. The assignee cannot, like a person conducting his own business, be permitted to wait four or six or twenty years without losing his remedies. He is an agent of the law, whose duty it is to wind up, and not to carry on business ; and the limitation, both for and against him, is fixed at a short period in order that both debtors and creditors of the bankrupt may have their rights determined without unnecessary delay.

Bailey *v.* Glover, 21 Wall. 342, 346.

It cannot be that Congress intended that there should be no limitation to suits by assignees against stockholders ; but that is the result if these actions can be maintained.

Baker *v.* Atlas Bank, *supra*.

*k.* It cannot be contended that the application for an assessment is the proceeding which must be brought within two years. That application is not a suit. It is not even necessary that the stockholders should be parties to it.

Upton *v.* Hansbrough, 3 Biss. 417.
Sanger *v.* Upton, 1 Otto, 56.

It is only a summary proceeding in the administration of the estate of the bankrupt corporation, and not an action either in law or equity, within the meaning of § 5,057. The action in this court is the first suit which has been brought against this defendant on his liability as a stockholder, and affords him the first opportunity he has had for pleading the Statute of Limitations.

4. To the suggestion that the Statute of Limitations does not run in favor of a trustee under an express trust till he has repudiated the trust, we answer: —

*a.* The stockholders are not trustees; they are mere debtors to a trust fund, which the corporation or some officer of the Equity or Bankruptcy Court was bound to collect and administer for the benefit of creditors. The right to collect the fund only arose on the insolvency of the company. The assignee's right accrued on his appointment. Then the statute began to run as against the debtors or contributories.

There is no authority or reason for the position that the stockholders are trustees under an express trust. The trustee is the corporation, or the winding-up officer. The only obligation of the stockholders is to pay money to the trust fund. They are under no fiduciary relation to the creditor.

Moreover, the trust upon which the trust fund is held is a constructive, and not an express trust. It is inferred by law from the circumstances, and not created by the express contract of the parties. It does not therefore stop the running of the Statute of Limitations.

Knox *v.* Gye, L. R. 5 H. L. 656, 675.
Banner *v.* Berridge, 18 Ch. Div. 254.

and if a majority of the stockholders shall vote for the increase of stock, the same may be increased by the board of directors, trustees, or other business managers of such corporation; and upon such increase of stock being made, in accordance with the by-laws, the date and amount of such increase shall be certified to the secretary of state by the directors or trustees, and from the time such certificate is filed the increase of stock shall become a part of the capital thereof.

Such certificate shall be filed and recorded in the same manner as the charter.

# Supreme Court of the United States.

OCTOBER TERM, 1881. No. 27.

COVILLE ET AL., *Appellants*, vs. NATHANIEL THAYER.

*Supplemental Brief for the Appellee upon the question whether the two years' limitation contained in the Bankruptcy Act is applicable and effective in this case.*

The appellant's answer to the statute is, that by law, as an indispensable preliminary to suit by an assignee to enforce unpaid subscriptions to the capital stock of a corporation, a decree must be had in a bankruptcy court, which shall ascertain whether, and to what extent, the assets of the corporation are inadequate to the payment of its debts, and which shall thereupon direct an assessment on unpaid subscriptions to the extent of the deficiency. That, from the date of such assessment only, does the statute begin to run. Upon an assessment of this character, each count of the appellant's declaration is framed, and it will be needless to inquire whether an assessment of a different character, *calling for the whole amount of unpaid subscriptions, irrespective of the state of the assets* of the company, is, under any circumstances, proper or necessary.

1st. The soundness of this proposition of the appellant, and the reason or principle upon which, if it be tenable, it can be rested, is the subject which we desire to discuss.

2d. Further, if upon any ground appellant's proposition can be maintained, the final inquiry must then be made, Are those grounds or reasons in any manner applicable to the facts in this cause?

## I.

It is proper at the outset to call the attention of the Court to the consequences that must clearly result from the adoption

of the doctrine upon which appellant's contention rests. Obviously, it will enable the assignee to utterly defeat the policy of the Act. The Act nowhere refers to any assessment. If such assessment be a legal pre-requisite, no period is prescribed within which it shall be had. All is in the pleasure of the assignee. He may, as in the present case, postpone for years any application for such assessment, and thus the two years of the statute become an indefinite period, unless, indeed, by a construction of the statute, it shall be held that both the assessment must be had and the suit commenced within the two years.

Although, as will be shown hereafter, various cases in other tribunals can be produced in which, without discussion or a statement of the principles on which they rest, assessments of the character claimed by the appellant have been stated to be requisite, possibly in supposed analogy to statute provisions requiring such assessment, or more probably by failing to advert to the distinction between proceedings in bankruptcy and proceedings *to finally wind up and distribute the entire assets of a corporation*, yet the doctrine contended for by the appellant has never been stated, nor, we think, has it ever been discussed in this Court.

The cases in this Court, so far as appears in the Reports, have merely determined that assessments which were shown to have been made in the Bankruptcy Court *of the whole amount* of unpaid subscriptions are valid, not that even such assessments are necessary, nor whether they are to be supported as an exercise by the Court of the powers and duties of the corporation which its insolvency has disabled it from discharging. Thus, untrammelled by precedents, the principles upon which assessments in bankruptcy rest are here open to investigation.

## II.

Is it, then, true that, *in bankruptcy*, such decree, ascertaining and comparing the assets of the company and its debts, and ordering assessments only to the extent of the deficiency, is, upon any ground, a necessary preliminary to a suit by an assignee to collect unpaid subscriptions?

1st. We repeat, that the question is not whether, having regard to the contract of subscription or to the charter or by-laws of the corporation, in case of bankruptcy, an immediate call by the bankruptcy court for the whole amount of unpaid subscrip-

tions, irrespective of the condition of its assets, may not be proper, on the ground stated in some of the cases that the Court succeeds to and will perform the duties which should have been performed by the directors or the company, and that shareholders are entitled to some call, with notice, to make them subject to immediate suit. No such question is raised by the pleadings in this cause.

2d. There is to be stricken from the discussion all reference to a class of cases in which, by statute, on the insolvency of a corporation, and in that event only, assessments, upon the exhaustion of the corporate assets and to the extent of any deficiency, are expressly, or by necessary implication, provided for.

These furnish no aid either by way of principle or authority to appellant's contention; on the contrary, they tend to show that without such provisions the law requires no such preliminary assessment to the enforcement of unpaid subscriptions. Such, among others, are the cases in this Court of Turnbull *vs.* Payson (95 U. S. R., p. 418), where, by statute, "in all cases of *losses* "*exceeding the means of the corporation*, each subscriber shall be "liable to the amount of the unpaid stock held by him" (S. C., 3 Bis., 452, *in nom.* Republic Ins. Co.), the cases of Kennedy *vs.* Gibson, 8 Wall., 506, Bank *vs.* Kennedy, 17 Wall., 19, where stockholders by statute were made conditionally liable after all the other resources of the bank had been exhausted, and the case of Pollard *vs.* Bailey (20 Wall., 520), where, by statute, if found insolvent by the Chancellor, an order is to be passed declaring such insolvency, and requiring its affairs to be wound up and settled, calls only to be made after assets are exhausted.

3d. Before adverting to the authorities, which show to what cases and under what circumstances the doctrine that the shareholder has a right to require an exhaustion of the company's assets before he can be called on for the balance of his unpaid subscriptions, it is material to inquire upon what this supposed right rests. Is it founded on an implied contract growing out of the relations of the shareholders to the corporation? If so, with whom is such contract made? Is it a mere contract with the corporation or associate members? That is to say, is it a right or an equity existing solely as between the parties, or is it a right as against creditors, which a court of bankruptcy is bound to protect?

It is submitted that the right or equity is merely one between the shareholders themselves; that it stands on the footing of subscriptions or other contracts, by the terms of which calls are only to be made on the existence of certain conditions, by designated officials, or at prescribed periods. All these are held to be mere agreements between the parties, and usually have reference to their conduct and rights while the corporation is pursuing the purposes of its creation, and not to the occurrence of bankruptcy. Accordingly, it is settled that they are impotent as against an assignee. Were this otherwise, they might, as in the case of subscriptions payable in annual instalments (see Dalton R. R. Co. *vs.* McDaniel, 56 Ga., p. 19), arrest the settlement of the estate and defeat the policy of the Act.

4th. Further, if a bankruptcy court is bound to protect such an equity, flowing from the relations of the shareholders *inter se*, or to the corporation, why is it to stop at that single equity? Why not recognize and settle all other equities between shareholders, or between shareholders and the corporation, which do not affect the gathering of assets sufficient to pay the debts? The supposed equity of stockholders to have the assets of the corporation exhausted before they are called upon for the balance of their subscriptions, in no way facilitates but retards the first object of bankruptcy proceedings, which is promptly to collect assets adequate to the debts. It is, so to speak, an outside equity, of which there may be many existing between the shareholders and the corporation.

## III.

But to proceed with the authorities. We think that the following propositions can be successfully maintained: —

1. That the right of the shareholder to require the exhaustion of the corporate assets, before being required to pay the balance of his subscription, is a right that only exists *in case of a general administration suit in equity, founded on statutory provisions, to wind up a corporation, settle all the equities between its members and the corporation, and its members inter se, and make a final distribution of its assets*, and that without such statutory provisions a court of equity has no jurisdiction thus finally to wind up a corporation.

2. That the Bankruptcy Act authorizes no such general

administration and closing-up of the affairs of bankrupt corporations, but is intended to be confined to the collection of assets sufficient to extinguish the claims of creditors, and there stops; leaving the corporation, when this is attained, to administer its remaining assets, if any, and settle all equities between its members and itself.

3. That in each case cited, where the Court has declared or suggested the right of a shareholder in bankruptcy to require such exhaustion of assets as a preliminary to being called on for unpaid subscriptions, the proceeding was under a statute, or the Court inadvertently assumed that the law, without any express provision, confers on a court of bankruptcy the jurisdiction to finally administer, wind up, and close the affairs of the corporation, and distribute its effects.

## IV.

As to the first proposition,—viz., that, except by statute, a court of equity has no jurisdiction to wind up and close the affairs of a corporation: the doctrine is stated by Mr. High, in his Treatise on the Powers and Duties of Receivers, section 288; and the authorities cited seem conclusive on the point. He states it thus: "A general administration of equity for corporations does not "extend to the power of dissolving them, or of winding up their "affairs and sequestrating the property and effects, in the absence "of express statutory authority.

"Under such general winding up, and under such only, can "the equity of shareholders to have the assets primarily applied "to the payment of debts be worked out."

In such general administration suit of the affairs of an insolvent corporation, a court of equity in marshalling the assets will, doubtless, exhaust all the equities between all parties. In doing this, it will, as to unpaid subscriptions to stock, act upon the principle that the shareholder is a *quasi* creditor of the company, entitled, if there be a surplus, to his distributive portion thereof. It will not, therefore, require immediate payment of subscriptions due, until it has first ascertained the extent to which it may be necessary to resort to these subscriptions, since otherwise it would proceed to make collections which it may shortly be compelled to restore. This is but part of its functions. It settles also the equities between the stockholders arising from the inequality of

their contributions or payments and the equities between the stockholders and the company; not merely those which arise out of subscriptions to stock, but from all other dealings between the parties. In fine, it adopts that general practice which governs in equity jurisprudence, that, once properly possessed of a cause, the Court exhausts it as between all parties, leaving nothing for future conflict.

Such being the rules and principles applicable to the winding-up of insolvent corporations by administration suits, it is obvious that, in the course of such administration, assessments of the character relied on by the appellants must be had; but these rules and principles are wholly inapplicable to proceedings in bankruptcy.

The Bankrupt Act does not provide for or propose the winding-up and final distribution of the assets of the bankrupt corporation, but merely for the realization from such assets of a sufficient sum to pay its debts. This done, it restores the residue, if any, *not to the shareholders, but to the corporation*, and leaves the latter to adjust the equities between it and the shareholders, and the shareholders *inter se*, upon just principles.

2 Black Com., ed. 1848, p. 488.
3 Bank. Reg., p. 55, *in re* Hoyt.
25 Mich. R., p. 40, Stearns *vs.* Earles.

So that in no event are subscriptions thus collected ever to be restored in whole or part by the assignee to the parties from whom such collections are made, as would be the case under a general administration or winding-up of the company.

There is, therefore, no ground or reason upon which an assessment on unpaid subscriptions limited to the deficiency of assets should be made by a bankruptcy court, so as to enable a delinquent shareholder to withhold his debt to the corporation until it shall be ascertained, in a final adjustment between him and the corporation, whether he may not be able to retain some part of that subscription as his share of the capital. The Bankrupt Act was not framed to enable shareholders to work out such a possible equity with its attendant delays.

## V.

That this supposed right of a shareholder thus to have the corporate assets exhausted is limited to suits in equity to finally administer the affairs of corporations, is shown by the numerous cases in which it has been sought by defendants to settle the equities between shareholders in bills brought by judgment creditors to reach unpaid assessments. If the equity to have corporate assets exhausted was inherent, and not dependent upon the form of proceedings in which such equity is claimed, then, in every judgment creditor's bill to reach unpaid subscriptions, the plaintiff would be required to aver and prove the state of the corporate assets compared with its debts, and limit his recovery to the amount for which the defendant was thus liable to assessment (see 13 Ohio R. 137). This would completely defeat all bills of that character, and it has accordingly been settled by this Court that, on such bill in equity by judgment creditor, recovery may be had to the whole extent of the unpaid subscriptions.

Hatch *vs.* Davis, 101 U. S. R., pp. 205, 211.

In the course of its judgment in the above case, the Court points out the distinction on which we rely thus: —

"It *may be* that, if the object of the bill is *to wind up the affairs* "*of the corporation*, all the shareholders . . . . should be "made parties, that complete justice may be done by equalizing "the burthens."

There is a suggestion at the close of the judgment (in answer to defendant's argument that all shareholders should have been made parties, so that they might share the burthen), that defendants "might have moved for a receiver, or they might have filed a "cross-bill to obtain a discovery of the other stockholders, brought "them in, and *enforced contributions* from all who did not pay their "subscriptions. This equitable right of contribution is not yet "lost." There is in this no intimation that such contribution is to be restricted to such amount as, after exhausting the assets, shall be found due on unpaid subscriptions. The plain doctrine of the judgment is that creditors are entitled, whether as against a single stockholder, or against all stockholders who may be made defendants, to recover the whole amount of unpaid subscriptions, if necessary, to satisfy the judgment.

## VI.

We come, finally, to a review of the cases in which are contained, either in declarations called for by the cause or in *obiter dicta*, a recital of the doctrine for which appellant contends; and this as if it were of general application in insolvency or bankruptcy, and making no reference to its being founded on statutory provisions, nor to the question whether the cause in which such declarations are made was a bill for general administration and winding-up of a corporation, or one seeking merely out of its assets to pay its debts.

The earliest case cited by the appellants, and which we have found, that contains a declaration of the supposed principle of thus marshalling assets, is Adler *vs.* Brick Company, 13 Wis., p. 57, A. D. 1860.

It was a creditor's bill by a judgment creditor against the company and against certain stockholders to reach unpaid subscriptions. Though there were statutory provisions prescribing such assessments, and completely applicable to and governing the case, yet the judgment of the learned Chief Justice contains an essay upon what he terms the jurisdiction of equity in this class of cases (which he declares to exist *at common law*, and independent of statutory authority). In it the doctrine contended for by the appellants is doubtless contained; but it will be difficult, upon scrutiny of the cases cited in support of this alleged common-law doctrine, to find it warranted. Nor is there, so far as we can see, in any of the cases cited, an allusion to the supposed principle that unpaid subscriptions are only to be resorted to after corporate assets are exhausted. But, what is more material, the whole doctrine is clearly rested entirely upon the ground that the proceeding in such cases is one of general administration, to wind up the affairs of the corporation; and upon this point we add the comment upon the case by High on Receivers, in a note to section 299, p. 190: "As regards the remedy against delinquent share-"holders, the statement is doubtless true; but the assertion "that the jurisdiction of equity by sequestrating property of the "corporation, and appointing a receiver to wind up the concern, "*exists at common law* and independent of the statute, is certainly "unsupported by the weight of authority. . . . . Nor does "the assertion of this doctrine seem to have been necessary to the "decision of the case as regards the appointment of a receiver,

"since the power of appointment in the class of cases was expressly "conferred by the statute."

Without encumbering this brief with an analysis of the several other cases cited by the appellants, we desire to call the attention of the Court to the fact that the above case of Adler *vs.* Brick Company is apparently the source from which, in many of them, the doctrine they contain is derived, and is adopted without discussion. Such is the case next in point of time of Upton *vs.* Hansbrough (3 Bis., 417, January, 1873), which merely declares that assessments may be made by the Bankruptcy Court without notice to creditors, and refers to Adler *vs.* Brick Company.

Next, in 1873, comes Payson *vs.* Stover (2 Dillon, 248), which declares that the assignee can only collect so much of the unpaid subscriptions as may be necessary to pay debts, and refers for this to Upton *vs.* Hansbrough, which we have seen contains no such doctrine, but cites Adler *vs.* Brick Company.

Next, April, 1874, is Myers, Assignee, *vs.* Seeley, where Treat, Justice, declares that in a judgment creditor's bill to obtain a receiver when there are adequate assets of the corporation, creditors have no legal or equitable right to insist on calls, and for this he again cites Adler *vs.* Brick Company.

Several of the other cases cited are governed by statute regulations; and the general answer to all the authorities referred to which are not governed by statute is, that they simply state a supposed rule without declaring the principle on which it is claimed to exist, and that this supposed rule adopts the principles which govern in the case of general administration, and applies them to cases where the administration is limited to the collection of sufficient assets to pay debts.

## VII.

Finally, if we are wrong in the foregoing views, that on no ground or principle is an assessment of the character claimed a necessity in bankruptcy proceedings, — and if it shall be held either that by implied contract, or by force of the principles of equity (which the law will apply to cases of partial administration of insolvent estates in bankruptcy, as if they were cases of general administration), delinquent shareholders possess the right to have the corporate assets exhausted before they can be called on

to pay up their subscriptions, — then we say that, upon the facts of this cause, no such right within those principles existed in favor of these defendants, making any assessment necessary.

The facts disclosed by the record are these: —

The corporation undertook to negotiate the sale of full-paid shares to the various defendants at rates less than the par value thereof.

However ill-informed the parties making such purchases may have been of the facts, or of the legal effect of the transaction, it is clear that in law the transaction must be deemed to have been invalid as against the creditors of the corporation.

Brice, *ultra vries*, 153, *in notes*.

On the bankruptcy of the corporation, the right vested in the assignee was immediate to redress the wrong. The parties committing the wrong could not be heard to say that, although the act was wrongful, they were entitled, before being called upon to pay, to have the state of the assets of the corporation, and the question of the deficiency of those assets, ascertained. Their liability did not rest on contract, by which their shares were to be subject to future calls for the remainder of unpaid subscriptions. Their contract was, that they were to be subject to no calls, no assessments. The assignee could at once enforce payment, and that payment could not be resisted upon the ground that an assessment in a bankruptcy court, of the character insisted upon by the appellants in this case, was a necessary preliminary to their being compelled to pay the deficiency.

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for appellees